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Journal Section

"APPOINTMENT OF RECEIVER BY CIVIL COURTS"*

By — Hon'ble Mr Justice Dr R R Misra, Judge, Allahabad High Court

Gentlemen,

I am given to understand that you are now on the verge of close of your training styled Foundation Course imparted by the Institute Thereafter you are expected to take over your new assignments as Judicial Officer at various places at the State During the course of your discharge of duties, among other matters you are expected to come across and will be obliged to deal with the applications moved by the litigants for the appointment of a Receiver I think it has been a prudent action on the part of your Director to have invited me this forenoon to deliver a lecture on the above topic to familiarise you with the connotation of the term Receiver its incidents the power functions etc that a Receiver is obliged to discharge under the Law My endeavour will be to apprise you in a birds-eye-view of the above topic and the various aspects connected therewith

Kindersely V C in "Evans v Coventry" (1854) 3 Drew 75 (at p 80) described a Receiver as follows "A Receiver is an impartial person appointed by the Court to collect and receive pending the proceedings, the rent, issues and produce of land or the produce of personal estate or other things in question which it does not seem reasonable to the Court that either party should collect or receive or where a party is incompetent to do so, as in the case of an infant' In the language of J L Migh a Receiver is an indifferent (American expression for impartial) person between the parties to a cause, appointed by the Court to receive and preserve the property or fund in litigation pendenje lite, when it does not seem reasonable to the Court that either party should hold it"

The status or nature of office of the Receiver is that he is not the agent or representative of either party to the action, but is uniformly regarded as an officer of the Court, exercising his functions in the interest of neither plaintiff nor defendant, but for the common benefit of all parties in interest Being an officer of the Court the fund or property entrusted to his care is regarded as being in custodia legis, for the benefit of whoever may finally establish title thereto Such a person is merely a creature or officer of the Court having such powers only as are conferred on him by the order of his appointment In other words a Receiver is frequently spoken of, 'as the hand of the Court" and the expression very aptly designates his functions, as well as the relation which he sustains to the Court The object sought for by the appointment of a Receiver is the safeguarding of the property for the benefit of those entitled to it One of the main incidents of his duties is to preserve and protect the property which is put into his possession and from this it

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* Lecture delivered at Institute of Judicial Training & Research, U P Lucknow

P Lakshmi Reddy v L Lakshmi Reddi, AIR 1957 SC 314 by laying down that although under the law the possession of Receiver is ultimately treated as possession of the successful party on the termination of the suit yet the receiver being an officer of the Court is not an agent of any particular party to the suit To treat such Receiver as plaintiff's agent for the purpose of initiating adverse possession by the plaintiff would be to impute wrong doing to the Court and its officers, which the law does not permit

Latest case qua possession of the Receiver is a decision of the Hon ble Supreme Court in the case of Krishna Kumar Khemka v Grindlays Bank P L C " (1990 (3) SCC 669) In that case, which was for a declaration that the various properties set out in the schedule belonged and still belong to the joint family consisting of the members mentioned in the plaint pending the suit a Receiver was appointed by the Court Grindlays Bank was the original tenant and they were occupying four flats Subsequently after the appointment of the Receiver the said tenant surrendered a portion of tenancy namely two flats These surrendered two flats were let out by the Receiver to M/s Tata Finlay Ltd Questioning the action of the Receiver an application was filed in the High Court contending that the Receiver had no authority to create any tenancy The said act of the Receiver virtually created two new tenancies after terminating the original tenancy of Grindlays Therefore, neither Grindlays nor Tatas who occupied two flats each were entitled to occupy the premises and they are liable to be evicted summarily More so, when such creation of new lease was done by the Receiver in violation of the injunction order issued by the Court and without the leave of the Court The Hon'ble Supreme Court after an examination of the various treatise on the subject as to whether such an action amounted to a "Transfer of Property", agreed with the view of the High Court that in the case of Tatas a new tenancy was created It held that in view of the injunction order, creation of such a new tenancy was legally barred As regards the nature of possession of Receiver, after relying "Kerr on Receivers' (12th Edn p 154), the Court observed that in appointing a Receiver the Court deals with the possession only until the right is determinated if the right be in dispute It also took note of the observation made in paragraph 10 of a decision of the Supreme Court in Kanhaiyalal v Dr D R Banaji AIR 1958 SC 725, wherein it was observed

> A Receiver appointed under Order XL of the Code of Civil Procedure, unlike a Receiver appointed under the Insolvency Act, does not own the property or held any interest therein by virtue of a title He is only the agent of the Court for the safe custody and management of the property during the time the Court exercises jurisdiction over the litigation in respect of the property

Similarly the possession of Receiver cannot be disturbed by a party except with the leave of the Court It is a different matter that such leave may be obtained either before or during the pendency of the litigation or even thereafter In case such a leave is asked for by a party it has to establish that it is entitled to it and on doing so leave has got to be granted by the Court Normally, grant of leave against the Receiver is a rule and refusal is exception because the Receiver represents neither party and is only an officer of the Court When a Court puts a Receiver in possession of property, the property comes under the custody of the Court Therefore any litigation disturbing the possession of the Court through the Receiver without its permission, amounts to contempt of its authority

Although various situations will arise when you work as a Judicial Officer of the Court, yet at this stage I would like to deal with two prominent situations which very often you may come across The first is that there is no such law that the issue of temporary injunction in any manner affects the rights of the plaintiffs to get a Receiver appointed that is to say that a Receiver can be appointed even after the issue of the injunction if the exigencies of the situation require it and the Court feels that it would be just and convenient to make an order in that respect This is so because the purpose of two is different As I had already invited your attention to the beginning of this lecture that the very basis of a necessity being felt for the appointment of the Receiver by a Chancery Court that the practice of issue of injunction by the Courts in England was found to be inadequate Therefore if the allegation made in the affidavit of party shows that the defendants were trying to harm the subject-matter of the suit and dispossess him from the property in dispute despite the injunction, it is always open to a Court to appoint a Receiver on the facts of the case (S E Industries Freegunj, supra)

The other contemplated contingency is a case of a partnership Firm If the partnership has been dissolved or is sought to be dissolved by the filing of the suit, Receiver can be appointed as a matter of course provided his appointment is sought for the taking over of the assets of the Firm and ultimately for distribution thereof to the partners and the relationship between the partners is extremely strained In the cases in which one of the partners has completely excluded the other from the management and the profits of the firm and funds are misappropriated, Receiver can again be appointed but for a running firm, the dissolution of which is not established the Court will be slow in appointing a Receiver because that will affect the position of the person who is running the business and is in de facto possession of the same Further the Court is also empowered to appoint a Receiver in a suit under Section 92 of the C P C for the removal of a trustee and settlement of a scheme Such a Receiver supersedes the management appointed by the Temple committee

As already stated above the powers exercisable by the Receiver are only those which have been conferred on him However, a Receiver can sue in his capacity as a Receiver He can also bring a suit for the ejectment or rent etc against a tenant A Receiver can also appoint a lawyer for pursuing litigation in the Court after obtaining leave of the Court In case of dispossession he can also sue for possession but all actions taken by the Receiver have to be done with prior permission of the Court

The Court while appointing a Receiver also fixes by a general or special order the amount to be paid as remuneration for the services of the Receiver under Rule 3 of Order 40 of the C P C Every Receiver so appointed has to perform certain duties At the outset of his appointment he has first to furnish his security as the Court thinks fit to account for what he shall receive in respect of the property Thereafter he is obliged to submit his accounts at such period and in such form as the Court directs and also pay the amount due from him as the Court directs He is also responsible for any loss occasioned to the property by his wilful default or gross negligence In default of failure to perform the aforesaid duties, the Court has power to sell the property of the receiver and out of the sale proceeds make good the deficiency or loss occasioned by him

Where the property is land paying revenue to the Government and the Court considers that the interests of those concerned will be promoted by the management of the Collector the Court may, with the consent of the Collector appoint him to be Receiver of such property In cases where action is taken by a Sub-Divisional Officer for the appointment of a Receiver under the Code of Criminal Procedure and thereafter civil proceedings are taken, in such a situation such an appointment is valid up to the time of the decision of the civil suit only

This leads me to the last aspect of the matter regarding termination or discharge of a Receiver Although neither Section 51(d) nor Order 40 of the C P C prescribes for the termination of the office of the Receiver yet the Hon'ble Supreme Court has in the case of, Hiralal Patni v Loonkaran Sethiya" AIR 1962 SC 21 laid down the law on the point thus

"(1) If a receiver is appointed in a suit until judgment, the appointment is brought to an end by the judgment in the action,

(2) If a receiver is appointed in a suit, without his tenure being expressly defined, he will continue to be receiver till he is discharged

(3) But, after the final disposal of the suit as

between the parties to the litigation the receiver s functions are terminated he would still be answerable to the Court as its officer till he is finally discharged (4) The Court has ample power to continue the receiver even after the final decree if the exigencies of the case so require "

But it may be made clear that there may not be automatically discharge of a receiver merely because the proceedings in which he is appointed terminate for the reasons that if the objects for which he is appointed Receiver are not achieved (See Ram Charan Agarwala v Shridhar Misra , AIR 1962 All 610)

In the end I must thank your Director for giving me an opportunity to be in your midst

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"BENEFICIARIES UNDER THE NEW MOTOR INSURANCE LAW"

By — M N Srinivasan, Advocate, No 4, 9th Main Road, Malleswaram, Bangalore 3

The provisions of the Motor Vehicles Act 1939 and in particular those of Chapter VIII relating to the Insurance of Motor Vehicles have been quite familiar with the members of the legal world connected with the dispensation of justice since over fifty years During these years the provisions of this Chapter have suffered major amendments two or three times mainly on the lines of the changes in the English Road Traffic Acts This was quite natural as the original provisions of Chapter VIII of 1939 Act itself was on the basis of English Act of 1930

This Act has again been extensively overhauled by the 1988 consolidating and amending Act Here again the changes in the provisions of the Chapter relating to Insurance of Motor Vehicles has been to some extent on the lines of the changes made in the English Act of 1972 All the while this process of adjusting our Laws from time to time to the changes in the corresponding English Act has been partly with a view to get the benefit of the interpretation of those provisions by the superior English Courts

Confining our attention to S 95 of the 1939 Act which lays down the requirements of policies to satisfy the provisions of Chapter VIII and the corresponding provisions namely S 147 of the 1988 Act which is word for word the same as that of the old Act except for the deletion of one proviso to the Section, it is interesting to examine whether the provisions of the section could at all have been drafted more elegantly At any rate it appears from what follows that there is avoidable [illegible]

Section 147(1)(b)(i) is the same as Section 95(1)(b)(i) of the old Act and refers to the requirement that the policy should cover the risk of death or injury 'to any person of a third party caused by the use of the vehicle ' Third party has been construed as any person other than the Insurer and the Insured who are the two parties to the Policy'[1] Here the words 'Person and 'Vehicle' are both unqualified

Hence, this clause is comprehensive enough to include risks caused by the use of any kind of vehicle that is whether it is a private Motor Vehicle or a public service vehicle which is defined as one used for the carriage of passengers for hire or reward etc It is also comprehensive enough to include the risk to 'any person' other than the Insurer and the Insured that is whether he is a passenger in the vehicle or not and whether he is a gratuitous passenger or one being carried for hire or reward or whether he is an employee of the Insured or not It may therefore be safely said that apart from liabilities under the Workmens Compensation Act, 1923 the amplitude of this clause (1)(b)(i) of S 147 by itself is quite comprehensive to cover the Act liability in respect of all persons other than the Insurer and the Insured caused by or arising out of the use of all kinds of Motor Vehicles for which the Act intended to make provision

If what is stated above is correct we will have to examine in what way the second clause of S 147(1)(b) adds to or takes away from what clause (i) of S 147(1)(b) comprehensively provides In the first place it must be pointed out that the opening words of clause (ii) 'against the death of or bodily injury to made no sense as no policy of Insurance can be taken against the death or injury but only against any liability that may be incurred in respect of the death of etc

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[1] Discount Simon L C in Digby v General Accident (1942) 2 All E R 319 (H L)

Now clause (ii) of S 147(1)(b) states that the policy must cover the risk of injury to any passenger of a public service vehicle caused by the use of the vehicle This, it is already seen above is covered under clause (i) itself, because clause (i) covers the case of injury of all persons by the use of all kinds of vehicles Hence this clause (ii) is redundant, unless it can be held that 'vehicle in clause (i) does not include public service vehicles This cannot be Again clause (ii) is silent about the case of the public service vehicle causing death of or injury to a third party who is not a passenger that is not being carried in the vehicle For this again recourse is to be had to clause (i) as pointed out above Thus in both ways Cl (ii) is ill-conceived and serves no purpose

It is silent where it ought to have covered the case of persons not being carried in a vehicle and redundant in the case of persons being carried in a vehicle where it ought to have been silent

Coming to the proviso (ii) of S 95(1) it must be understood that the purpose of a proviso is only to state in what circumstances the main provision does not apply[2] But here we find that the proviso which curiously contains a proviso within a proviso states in effect that persons being carried in private vehicles need not be covered [3] It should have stopped at that But it further proceeds to say that where a vehicle is one 'in which passengers are carried for hire or reward or in pursuance of a contract of employment the passengers must be covered, which proposition is already contained in the main provision and so did not require to be restated Thus proviso (ii) to S 95 (1) also is defectively drafted and had to be rectified but for its being deleted in S 147(1) of the new Act By this deletion it follows that what was excepted from the main provision by the proviso is now not excepted Thus it follows that under S 147(1)(b)(i) risk of 'any person being carried in the vehicle other than the insurer and the insured and under S 147(1)(b)(ii) risk of any passenger of a public service vehicle whether he is fare paying or not also is to be covered subject to proviso (i) which relates to employees of the 'insured It must be pointed out here that the question whether ticketless passengers in buses are entitled to be covered or not was left open by the Supreme Court in MPSRTC v Zenabai, AIR 1977 SC 2206 under the 1939 Act

If there is any ambiguity in the legislation the question has to be resolved having regard to the underlying purpose of the provisions of Chapter 8 (now to chapter XI) That is a sensitive process which has to accommodate the claims of society as reflected in the purpose" Please see Motor Owners Insurance Co v J K Modi AIR 1981 SC 2059

Such defective drafting of Legislation when pointed out should be examined early and corrections be suggested by the Executive or the Law Commission in order to avoid wasteful litigation A recent PTI report of 12-11-1990 shows that Motor accidents which caused 5106 deaths and 37731 injuries in 1960 were responsible in 1988 for 255278 accidents in which there were 49218 deaths and 206060 severe injuries

It therefore appears quite fit in order to interprete the deletion in the 1988 Act of proviso (ii) to S 95(i) of the old Act as an indication that the purpose of the legislation is that all passengers being carried in private cars or in public service vehicles whether they are gratuitous or fare paying should be covered by compulsory Insurance policies required under Chapter XI of the 1988 Motor Vehicles Act and paid just compensation for the suffering caused to them

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[2] Ramesh Chandra v Maharashtra State AIR 1981 SC 1127

[3] See also Pushpabai v Ranjit G & P Co , AIR 1977 SC 1735

CONSTITUTIONAL VALIDITY OF RESERVATION FOR O B Cs IN U P

By — Janardana Singh, Advocate, A-1171, Indira Nagar, Lucknow

The Government of U P on August 20 1977 had passed an order of reservation in favour of O B Cs (that is, so-called 'other backward classes, or castes other than Scheduled Castes and Scheduled Tribes) This reservation was to the extent of 15% in class 1 class 2 and class 3 services and 10% in class 4 services because reservation for SC/ST, physically handicapped, dependents of freedom struggle sufferers and ex-servicemen had already been provided for up to 35% and 40% respectively, the total, according to the Supreme Court decisions, which was required to be less than 50% (see, e g M R Balaji v State of Mysore, AIR 1963 SC 649) Thus the total reservation as per U P Government order of 1977 came to 50%

The validity of this order was challenged in a writ petition Chhotey Lal Pandey v State of U P, AIR 1979 All 135 A Division Bench of the High Court held that there was no material to show that the castes mentioned in the said Government order were in fact 'socially and educationally backward' as required by the interpretation of Article 16(4) by the Supreme Court, in the light of Articles 15(4) and 340 of the Constitution read together A proper inquiry should have been ordered with a view to ascertain what classes of citizens could be called socially and educationally backward It was found that these castes were mentioned in the Government order of 1945 issued by the Education Department, in which it was said that special facilities should be provided for the education of members of these castes The High Court pointed out that during the preceding three decades a lot of progress had been made by the multitudes of weaker sections of people through the launching of various Five Years Plans and the situation of 1945 could not be presumed to have continued till 1977 Moreover the United Provinces Government Order of 1945 referred only to educational backwardness and not to social backwardness The Supreme Court itself had laid down that the position of backward classes should be reviewed after every few years because the standard of backwardness could not be presumed to remain static (vide State of Andhra Pradesh v Balram, AIR 1972 SC 1375) para 99 in which it was stated that Government should not act on the basis that once a class is considered as backward class it should continue to be backward for all time The same view was expressed in Pena Karuppan v State of Tamil Nadu (AIR 1971 SC 2303 paras 13 to 20) Accordingly, the High Court held that merely because the then Government in 1945 had found that certain castes were at that time educationally backward it could not be taken for granted that they continued to be educationally backward in 1977 Nor could it be taken for granted that a caste which was educationally backward was also necessarily socially backward as well The Supreme Court had held that as in Article 15(4) it was required under Article 16(4) also that a class in order to qualify for reservation should be socially as well as educationally backward, and not merely that it should be socially or educationally backward

The U P Government went in appeal against this decision to the Supreme Court When the appeal came up for hearing the Government informed the Supreme Court that it had appointed another Commission for identifying the backward classes, and that the Commission had submitted its report which was under the consideration of the State Government Accordingly, the Supreme Court dismissed the appeal (No 577 of 1979) on August 11 1987 Actually, the representation made to the Supreme Court about setting up of another Inquiry Commission was not factually correct and the representation seems to have been made only because the Government found the High Court decision unassailable on merits Thus for all practical purposes the appeal was not pressed by the Government itself and the decision of the High Court became final and binding on the U P Government

In spite of this, the U P Government passed an Ordinance in 1989 (later replaced by the Uttar Pradesh Public Services (Reservation for Backward Classes) Act, 1989 21 of 1989) providing for reservation to the extent of 15% (Class 1, 2, 3)(and 10% (Class 4) respectively for practically the same castes as were mentioned in the 1977 Government order which was struck down as above The Government order of 1977 had mentioned 37 Hindu castes and 21 Muslim castes, out of which Barhai Darzi, Nai Kisan, Manihar were common to the two lists Moreover Kori and Koeri were separately shown, while now (1989) only one spelling (Koeri) is given Thus 52 castes were mentioned in all The Act of 1989 combined the two lists into one list of 55 and used the word Muslim only for the entry Muslim Kayastha Bhotia was omitted this time and four new castes namely Kamboj Giri Biyar and Bari were added and it was thus that the number of castes increased by three But these four inclusions and a single exclusion appear to be based on a merely political decision dictated by the clout of the respective castes, as no inquiry of the kind required by the High Court or intimated to the Supreme Court was held whatsoever

The decision in AIR 1979 All 135 is specifically mentioned in the Mandal Commission Report in Chapter VII para 7 40 Thus the Act was 1989 was itself invalid being in the teeth of the binding decision in Chhotey Lal Pandey's case Now by increasing the reservation to 62% by raising the O B C percentage from 15 to 27, the illegality has been further aggravated The plea taken by the Government is that in some southern States there is provision for reservation up to 62% True, but the Supreme Court has never departed from its view about the upper limit of 50% It may be that in those States 62% has not been challenged but that does not nullify the law laid down by the Supreme Court

The Mandal Commission itself had in Chapter XIII of its report accepted, after a review of the reservation provisions in all the States that the Supreme Court s decision that aggregate reservation should be less than 50% was binding Accordingly, it recommended 27% for O B Cs because 22 5% had already been reserved in Central services for SC/ST making a total of 49 5 Thus the figure of 27% was arrived at by the Mandal Commission on the basis that existing reservations (at the Central level) were only to the extent of 22 5% In U P , where the existing reservations including 15% for O B Cs (as reenacted in 1989) already totalled up to 50%, there was no scope for further increase by 12% It could not thus be justified by even the Mandal Commission report which itself proceeds on the "below 50%" limit Moreover the object of making provision for reservation never was to deny equality of opportunity to all and in the opinion of Dr Bhim Rao Ambedkar it was never to exceed more than 50% It would be worth while to quote Dr Ambedkar (Speech of Dr B R Ambedkar in Constituent Assembly on 30-11-1948)

'As I said the Drafting Committee had to produce a formula which would reconcile these three points of view firstly, that there shall be equality of opportunity, secondly, that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in so to say into the administration If honourable Members will bear these facts in mind the three principles, we had to reconcile — they will see that no better formula could be produced than the one that is embodied in sub-clause (3) of Article 10 (Article 16 of the Constitution) of the (draft) Constitution they will find that the view of those who believe and hold that there shall be equality of opportunity has been embodied in sub-clause (1) of Article 10 It is a generic principle At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now — for historical reasons — been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is we shall be completely destroying the first proposition upon which we are all agreed namely, that there shall be an equality of opportunity Let me give an illustration Supposing for instance reservations were made for a community or a collection of communities the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats It is then only that the first principle could find its place in the Constitution and effective in operation'

Further assurance of Chief Minister that reservation would also be made in favour of hill people and poorer families of so-called upper castes (as favoured also by the new Prime Minister and by Sri Narain Dutt Tewari) only worsens the matters, because if that is done, then the aggregate reservation will go up to 70 or 75%, leaving only one-quarter posts for the general category This is not permitted by the Constitution at all

Introduction of the economic criterion in reservation should not mean that poorer families of so-called upper castes should also be given reservation That will be constitutionally unjustifiable and may lead to lot of corruption as the loopholes will be difficult to plug What is required is that among the castes which are given the benefit of reservation the same should not be available to candidates coming from families who have clearly ceased to be socially and educationally backward, such as sons and daughters of I A S /I P S officers, Ministers, Professors, Industrialists, Doctors etc

Even Sri G S Gill, who was Secretary of the Mandal Commission (and has been profusely praised by the Commission itself in the Introduction to its report) and who strongly supports the O B C reservation and the Mandal report generally has very rationally suggested three qualifications to the recommendations of the Commission He says in an article published in the Times of India on April 4 1990 - -

'However there is no reason to exclude merit-list backward class candidates from the reserved quota Suppose there are 100 vacancies and 50 reserved quota candidates obtain the top 50 positions in an open competition In that event the quotawallahs will get all the posts which is indefensible

Secondly, when the backward classes have made enough progress to secure a fair proportion of merit-based posts reservations should be scrapped

Thirdly, a means test (income ceiling) should be applied within the backward classes

It is also significant that so-called "Muslim Kayasthas have also been shown as backward when Hindu Kayasthas are admittedly not backward How could they have become backward merely by conversion Kayasthas, like Raja Todarmal, as masters of Urdu and Persian, had enjoyed high positions even in Moghul rule If any Kayasaha got converted as a Muslim during Muslim rule it may have been for advancing his prospects further and it could not have worsened his social position Moreover as Mr Rafiq Zakaria has pertinently observed in an article in the Statesman dated December 18, 1983, 'to identify converts especially, after a certain lapse of time, among Muslims is most difficult, if not impossible, as Islam obliterates all such initial distinctions' In actual practice candidates are required to obtain caste certificates from the Collectorate In many cases, greasing the palms of corrupt revenue staff may enable any Muslim to secure the certificate that he was a Muslim Kayastha, which none can then disprove

BOOKS REVIEWED

GUPTA'S — PROMISSORY NOTES (LAW PRACTICE AND PROCEDURE SIXTH EDITION, 1990 (REVISED, ENLARGED AND UP-DATED) By A R K Murthy, Adovate, Published by Asia Law House, Opp High Court, Hyderabad (A P) Pages — LXXX + 356 Price Rs 125=00

There are many commentaries on Negotiable Instruments Act, but hardly any exclusively dealing with Law of Promissory Notes This book now running into 6th Ed shows its popularity among the legal fraternity A book exclusively dealing with this subject was a real need This book fulfils that need It is a comprehensive treatise which covers all aspects of promissory notes and the law practice and procedure relating to them This book deals with the subject analytically and includes allied provisions of other laws both procedural and substantive which have a bearing on the subject He explains and comments in a precise and lucid language All the recent developments of law and litigation have been attended to in proper places with up-to-date case-law which has made the book most dependable reference book

This edition is thoroughly revised and enlarged A few new chapters are added with latest amendments on cheques etc The Bench and the Bar will find this commentary self sufficient and dependable guide

L K K

LAW OF SPECIFIC RELIEF (ACT 47 OF 1963) 1990 EDITION — By P S Narayana, B Sc , M A , B L , Advocate Published by Asia Law House, Opp High Court, Hyderabad (A P) Pages XCiv 492 Price Rs 180 = 00

This branch of an important law deals with law of procedure The old Act of 1877 was replaced by the Act of 1963 The Specific Relief Act deals with equitable remedies like recovery of possession, specific performance of contract rectification of instruments, declaratory relief and injunctions There are a large number of books on this subject written by many eminent authors which are large voluminous works but this book of Sri Narayana is written in an analytical style and is quite distinct from other works on the subject It will be found more beneficial and helpful commentary as compared to similar other books

The Bar and the Bench, the teachers and students of law would surely find this commentary a valuable addition to their libraries

L K K

T S VENKATASA IYER'S "THE LAW OF CONTRACTS", FIFTH EDITION, 1990 VOL I & II, REVISED AND ENLARGED by S Krishnamurthi, B Sc , B L , G D C S , F C S , AICWA, Company Secretary and Advocate Published by Asia Law House, Opp High Court, Hyderabad Pages — Vol I = XCxII + 826 Vol II = CLX + 1002 Price Rs 600/- for set of 2 Volumes

Since the publication of the last edition of this work many changes have taken place in the law of Contract, Sale of Goods and Partnership Acts, which made it necessary to have a revised and enlarged edition of this work

This edition is spread over two volumes The first volume is in the form of lectures in which the basic principles are explained with leading English and Indian decisions The second volume contains a full-fledged section-wise commentary with exhaustive reference to Indian and important English decisions

This 5th edition has been thoroughly overhanded by the eminent Jurist and Professor Dr S Venkataraman and the experienced senior advocate Sri K Ramamurthy The revising authors have maintained the standard of the original work and have taken care to improve upon it wherever necessary giving a complete exposition and a comparative study of the Indian and English case-laws

The book will be very useful to the learners and the learned to the judges and the jurists and particularly to the lawyers, students and the companies

L K K

THE RAILWAY LAWS IN INDIA — RAILWAYS ACT, 1989 (ACT 24 OF 1989) & RULES EDITION 1991 — By P S Narayana, B Sc , M A , B L Advocate, High Court of Andhra Pradesh Published by Asia Law House, Opp High Court, Hyderabad-2 Pages XLvii + 924 Price Rs 250/-

The Railways Act, 1989 came into force

w e f 1-7-1990, while the Indian Railways Act was enacted in 1890 when the Railways were introduced in India and were being managed by private companies of British origin Now the Railways have become a part of the Indian Government

The 1989 Act contains two hundred sections Several provisions of this Act are substantially similar to those in the repealed Act while in certain sections there are certain changes that became necessary due to changed conditions and circumstances The reader will find corresponding provisions of the repealed Act and the case law at their appropriate places The book also contains xxxvi Appendices in which are incorporated relevant Acts and Rules to make the treatise as complete as possible

The Bar and the Bench and the commercial organisations who are required to utilise the services of railways would find this commentary very handy and useful

L K K

PROFESSIONAL ETHICS & ADVOCACY, SECOND EDITION, 1991 By C Rama Rao, B Sc , M L , Reader, University College of Law, Andhra University, Y Vijayalakshmi Tayar, B Sc , B L , Associated Advocate, Y S R L Law Chambers, Advocate, A P High Court and Y Nageswara Rao, B A , B L , Associated Advocate, Y S R L Law Chambers, Kakinada Published by Gayatri Books, 64/11 M V P Colony, Visakhapatnam (A P) Pages viii + 176 Price Rs 30/- Library Edition Rs 40/-

The legal profession is an important branch of the legal system Advocacy is a profession and an advocate has to plead either for or against in the Court as per his clients position He has to maintain a high standard of professional ethics and its absence would set a bad example to the profession and before the public The moral and ethical standards for an advocate have got to be of a high standard

In this book the authors have reflected their research work In the fourteen chapters they have discussed the status of the Bar, its functions responsibilities and the code of conduct They have emphasised the important role of an advocate in the legal world, his responsibility to the Court, to his client and to the cause of justice

This is a fine thought provoking research study that will be of much use to the lawyers, law teachers and their students and others

L K K

The Hon'ble Mr Justice
R K TRIVEDI
Allahabad High Court

Born in a farmer's family. Graduated from Agra University in 1966 and passed LL B Examination from Lucknow University in 1968 in Ist devision and stood VIII in order of merit. Enrolled as an Advocate in 1968 with Bar Council of Uttar Pradesh. Started practice in Civil Court at Banda. Shifted to Allahabad in 1974 for practice in High Court. Practised mainly on Civil and Constitutional Law. Assumed office of Judge of Allahabad High Court on 23 8 1990

The Hon'ble Mr Justice
RAM BHUSHAN MEHROTRA
Allahabad High Court

Born on 3rd July 1934. Joined profession as lawyer in 1956. Enrolled as an Advocate in Bar Council of U P in 1962. Practised as lawyer in the District Courts at Orai in 1956-1967. Practiced as an Advocate in the High Court of Allahabad in 1967-1980. Practised as an Advocate in Supreme Court, was enrolled as an Advocate on Record in Supreme Court in 1980-June 1990. Appointed and worked as Panel lawyer of U P Government in Allahabad High Court in 1970-76. Declined to accept the appointment of Standing Counsel of Government of U P in 1980. Elevated to the Bench as Judge High Court at Allahabad on 6-7-1990

The Hon ble Mr Justice
G P MATHUR
Allahabad High Court

Born on 19th January, 1943 Joined the Bar after a brilliant academic career, having secured merit scholarship in High School examinations of U P Board and V position in Special paper in M Sc (Physics) in Allahabad University Passed LL B in 1964 and was enrolled as advocate on 8th December, 1964 Started practice in High Court in January 1965 Worked on Civil, Criminal and Writ side Was senior standing counsel for U P Sttae Electricity Board, New India Assurance Co , Oriental Insurance Co , National Insurance Co , and United India Insurance Co Was member of council for Law Reporting (I L R series) and was on the Editorial Board of U P Local Bodies and Educational cases, a monthly Law Journal Elevated to the Bench of Allahabad High Court on 6th July, 1990

Hon'ble Mr Justice
Radhey Krishna Agarwal
Judge Allahabad High Court

Born in 1932 at Allahabad After do
M Com , LL B from Allahabad Univers
joined District Court at Allahabad as Plea
in 1954 and enrolled as an Advocate, A'
habad High Court in 1959 Joined U
Judicial Service in 1960 and was posted
Munsif at Varanasi, promoted as Civil Juc
in 1970 as Civil & Sessions Judge in 1973 a
as Additional District Judge in 1975 Work
as Legal Advisor to Nagar Mahapal
Development Authority and Jal Sansth,
Kanpur Worked as District Judge at Sitap
and thereafter at Meerut Elevated as Jud
High Court on 1-8-90

ADMISSION AND DECLARATION OF RESULTS AS A RESULT OF FRAUD/ MISREPRESENTATION — WHETHER ESTOPPEL AGAINST THEIR WITHDRAWAL/CANCELLATION ?

By — B D Agarwala, Sr Advocate, A-4, Sector 14, NOIDA 201 301 (U P)

Wrong declarations submission of forged certificates, manipulations of tabulation charts forged or manipulated marksheets and the like are gradually becoming the order of the day Students have been resorting to these methods more and more while at the time of seeking admissions in various Universities and other educational institutions, and, before or after the declaration of results of the various examinations conducted by these institutions This is done sometimes solely on their own and sometime with the connivance of the authorities Whatever it be many of such cases happen to ultimately enter into courts by way of proceedings initiated in that forum and justice is sought This is so, both in the regular civil courts as also more in the various High Courts and ultimately some travel up for adjudication to the apex court of the land the Supreme Court of India

A question which frequently arises is the question as to whether the particular University or the institution would be estopped from withdrawing/cancelling the admission or the declaration of the result as made in pursuance to or as a result of fraud/misrepresentation

Estoppel is a rule of equity and hence the following two well known maxims of equity will apply

(i) He who seeks equity must do equity.

(ii) He who comes into equity must come with clear hands

(See Snell's Principles of Equity 28th Edn Part I, Chapter III)

The Supreme Court had the occasion to consider the doctrine of estoppel embodied in S 115 of the Evidence Act in the case of Gyarsi Bai v Dhansukh Lal, AIR 1965 SC 1055 (1061) Paragraph 8 The three conditions laid down were

(i) Representation by a person to another

(ii) the other shall have acted upon the said representation and

(iii) Such action shall have been detrimental to the interest of the person to whom the representation has been made

In Maddanappa v Chandramma (AIR 1965 SC 1812 Para 9) it has been observed by the Supreme Court thus

The object of estoppel is to prevent fraud and secure justice between the parties by promotion of honesty and good faith Therefore where one person makes a misrepresentation to the other about a fact, he would not be shut out by rule of estoppel, if that other person knew the true state of facts and must consequently not have been misled by misrepresentation '

Estoppel again received detailed consideration of the Supreme Court in the case of M P Sugar Mills v State of U P (AIR 1979 SC 621 1979 All LJ 368) Even in this case where the Court strongly disapproved resilience from a promise it was held that this principle of estoppel which being a principle evolved by equity, and is meant for prevention of fraud or manifest (in) justice would obviously stand ruled out in a case where fraud itself brings about the representation This fundamental principle again came to be noticed by the Supreme Court in Commissioner of Income-tax (Central) v B N Bhattacharjee (AIR 1979 SC 1725) and Krishana Iyer, J speaking for the court said at page 1738

What in essence is estoppel ? Estoppel is a rule of equity which forbids truth being pleaded or representation on which faith, another has acted to his detriment being retracted

1991 All L J Jour /2(1) 8 pp XII

In S B Noronah v Prem Kumari Khanna AIR 1980 SC 193 it has been observed thus in paragraph 20

"It is an old maxim that estoppels are odious although considerable inroad into this maxim has been made by modern law Even so a judgment obtained by fraud or collusion even it seems a judgment of the House of Lords, may be treated as a nullity The point is that the sanction granted under S 21 if it has been procured by fraud or collusion, cannot withstand invalidity because otherwise, high public policy will be given as hostage to a successful collusion

In Bouvier's Law Dictionary 3rd Revised Edn at page 1083 second column second last paragraph it has been stated thus

"This doctrine does not apply where the defence is that by reason of fraud the writing on which the estoppel is claimed does not embrace the contract as originally made

In Bigelow on Estoppel — Carter (Sixth Edn at page 646) it is stated thus

The representation must have been a free voluntary act and if obtained by the party who acted upon it it must have been obtained without artifice If it has been procured by duress or by fraud there will be no estoppel upon the party making it it would seem, though he made it with the full intention that it should be acted upon indeed it is said that where the conduct supposed to have created an estoppel was brought about or directly encouraged by the party alleging the estoppel no estoppel is created

In the case of Krishan v Kurukshhetra University (AIR 1976 SC 376) the University was held estopped from withdrawing the candidature of a candidate at the examination This was a case on its own peculiar facts and the decision was based on a provision in the Ordinance where power of withdrawal of candidature was limited to the time before the candidate took the examination It was in these circumstances that the Supreme Court permitted the plea of estoppel to be successfully invoked Cases of false statement or concealment were noted as exceptions in this case also This decision of the Supreme Court came to be followed by the different High Courts in the context of varying facts Many wrong decisions were reached as a result of blindly following this decision without taking notice of the very basis of the decision of the Supreme Court No general rule was laid down by the Supreme Court in that case to the effect that the principle of estoppel could be successfully invoked in every case where the admission or the declaration of results once made was sought to be cancelled or withdrawn

This Supreme Court decision in the case of Shri Krishan v Kurushhetra University (supra) also came to be followed by the Allahabad High Court in the case of Tarkeshwar Lal v University of Gorakhpur and other connected cases (Writ Petition 1209 of 1977 etc decided on April 26 1978) There were cases of manipulation in the tabulation charts in connivance with University officials

In Kedar Lal v Secretary, Board of High School and Intermediate Education (AIR 1980 All 321) where before another Division Bench of the same Court reliance was placed upon the decision of the Supreme Court in the case of Krishan v Kurushhetra University (supra) the court clearly held that in that case the Kurushhetra University did not have the power to withdraw the candidature and hence their decision being on its own facts was clearly distinguishable By this decision doubt as to the general applicability of the aforesaid case of Krishan v Kurushhetra University (supra) stood allayed to a certain extent but it continued to be followed by the various High Courts depending upon the particular set of facts in the context of which the decision was called upon to be made by the Court, and where relief was intended to be given to the candidate concerned The decision of the Allahabad High Court in the case of Tarkeshwar Lal v University of Gorkhpur (supra) was appealed against in the Supreme Court which ultimately after a lapse of several years came to be finally decided on 2 8 1991 (Civil Appeals Nos 692/80 693/80 719/80 720/80 and 721/80) The Supreme Court was of the view that law was well settled on the subject and held that no question of estoppel could arise against the University if admission to examination was obtained on misrepresentation and the orders of the High Court were set aside

In Ashok Chand Singhvi v University of Jodhpur AIR 1989 SC 823, Supreme Court while granting relief to the candidate concerned cautioned to make a note that upon the facts placed before it the candidate was not at fault and hence he should not be made to suffer for the mistake of the authorities Yet in another case Sanatan Gauda v Behrampur University AIR 1990 SC 1075 Supreme Court while allowing the appeal of the candidate in relation to declaration of his result by the University, and granting relief to him clearly noted that that was not a case where the appellant could be accused of making any false statement or suppressing any relevant fact and could not be accused of any fraud or misrepresentation

Action of authorities undoing their earlier acts upon discovery of fraud or misrepresentation have come up for adjudication before many High Courts When the principle has been correctly applied the plea of estoppel has been repelled See —

In Re New Monkhooshi Tea Co (AIR 1967 Cal 196)

In Haripada Das v Utkal University (AIR 1978 Orissa 68)

In Krupa Sindhu Malik v Orissa Board of Secondary Education (AIR 1981 Orissa 91)

In K Rja Gopalan v Tamil Nadu Public Service Commission (1978) 2 Mad LJ 409)

In Ganesh Prasad Soni v Jawahar Lal Nehru Krishi Vishwa Vidyalaya Jabalpur (AIR 1982 Madh Par 116)

In Madras Steelware Industries Madras v Joint Chief Controller of Imports and Exports (AIR 1977 Madras 377)

In Mst Shib Dai v Gauri Lal (AIR 1965 J & K 113)

The question next arises how is fraud established ? It is not necessary that direct affirmative or positive proof of fraud be given Circumstantial evidence is not only sufficient but in many cases it is the only proof that can be adduced In matters that regard the conduct of men the certainty of mathematical demonstration cannot be expected or required Like much of human knowledge on all subjects fraud may be inferred from facts that are established Care must be taken not to draw the conclusion hastily from premises that will not warrant it but a rational belief should not be discarded because it is not conclusively made out If the facts established afford a sufficient and reasonable ground for drawing the inference of fraud the conclusion to which the proof tends must in the absence of explanation or contradiction be adopted It is enough if from the conduct of party the Court is satisfied that it can draw a reasonable inference of fraud (See Kerr on the Law of Fraud and Mistake 7th Edn)

In Bower on Law Relating to Estoppel by Representation (Second Edn) at page 129 130 it has been stated thus

Illegality

It is good affirmative answer to a case of estoppel by Representation that the allowance of the estoppel must result in illegality It is for the representor to bring the illegality to the notice of the Court in which case the Court is bound to give effect to the objection and to ignore any estoppel which may stand in the way indeed whether the illegality is formally pleaded or otherwise insisted upon by the representor or not, it is the duty of the Court as soon as it has notice of it in any way or from whatever source to take this course

The Doctrine of Estoppel needs proper application The factual matrix in each case varies Any misapplication may become a most effective weapon for accomplishment of injustice

"A LEGAL AUTOPSY OF SUB RULES (8) & (9) OF RULE 12 OF U P INDUSTRIAL DISPUTES RULES, 1957 "

By — M M Ahuja, Advocate and Labour Laws Consultant,
KL-34, Old Kavi Nagar, Ghaziabad 201 002

The purpose of this write up is to conduct a legal autopsy of sub rules (8) and (9) of Rule 12 of the UP Industrial Disputes Rules 1957, as amended by the Uttar Pradesh Industrial Disputes (sixth Amendment Rules 1978) and notification dated 19th Jan 1978

But before so doing let us recapitulate that the said Rule 12 deal with proceedings before Labour Courts or Tribunal and inter alia provide for filing of written statements and rejoinders

Sub-Rule (8) reads

"The written statement filed by the union or the workmen shall state the grounds on which the claim of the concerned workman is based and the written statement shall be accompanied by an affidavit in which the contents of the written statement are sworn to

Sub-Rule (9) reads

"If the affidavit accompanying the written statement of the union or the workmen is not rebutted by the employer, the labour court or the Tribunal as the case may be, shall presume the contents of the affidavit to be true and make an award accepting the facts stated in the written statement.

2 It is pertinent to note that the words "is not rebutted by the employer" are not qualified in what manner the rebuttal is to be made Where the case is contested by the employer on merits is not rebuttal presumed ?

This leads us to be question whether the provisions of sub-rules (8) and (9) supra are mandatory or directory only To answer this question let us analyse what could be the legislative wisdom behind the abovesaid sub-rules as amended vide notification dated 19 Jan , 1978

3 The government must have experienced that in majority of references made to the labour courts and industrial tribunals the opposite parties do not put in their appearance In such situations to save the time of the courts possible provision is made so that the courts could make an award in terms of the written statement if it's supported by an affidavit Now a crucial question arises what would be the impact of sub-rules (8) and (9) in the following situation —

(1) Is it a sine qua non for a union or the workmen to file their written statement duly supported by an affidavit swearing the contents of the written statements ?

(2) Will the case of the union or the workmen abate/fall flat if their written statement is not supported by a duly sworn affidavit ?

(3) If the employer puts in his appearance and fights the reference order on merits, then can his defence be struck down because he had not filed a formal counter affidavit ?

(4) Where the employer is absent and proceedings are held ex parte is the labour court or industrial tribunal under no legal obligation to satisfy itself with the case of the union or the workmen before making an award or is it highly disabled with no choice but to make an award in terms of the affidavit accompanying a written statement ?

(5) Can the provisions of sub rules (8) and (9) supra cripple/fetter the independence of quasi judicial functions of a labour court or industrial tribunal, to make an award in terms of the affidavit irrespective of the merits of the case just because the other party is absent

(6) If the employer puts in his appearance to contest the reference order on merits and also files his counter affidavit but abandons the proceedings at some later stage then can the labour courts or industrial tribunals take

shelter under the above said sub-rules to make an award ?

(7) If in the course of adjudication proceedings it transpires that the contents of the affidavit are false and baseless, can the union or the workmen be hauled up for contempt proceedings or is it a case strictly of one way traffic ?

(8) Do sub-rules (8) and (9) of Rule 12 supra apply with equal force in case of application and proceedings under S 33C(2) of the Central enactment No XIV of 1947 and or proceedings under S 6H of the UP Act

4 Answers to the above said queries are obvious Therefore, it is hoped there would be a consensus of opinion amongst legal pundits that the provisions of sub rules (8) and (9) of rule 12 are only directory and cannot be mandatory at all In fact it can be safely stated that the said provisions are futile because of the rules of law as settled in a catena of judgments For instance in the case of –

ANDHRA PRADESH STATE ROAD
TRANSPORT CORPORATION
VS
STATE OF ANDHRA PRADESH
(1990) 77 FJR 509
= (1991) I Lab LJ 235

the High Court Andhra Pradesh has inter alia held

The absence of a party does not entail the consequence that an award will straightway be made against him It is still the duty of the presiding officer of the Labour Court to go into the merits of the dispute and give such findings as he can on the material placed before him

CONCLUSION

From the foregoing discussions it can, therefore be safely deduced as under –

(1) That it is not imperative for a union or workmen to file its written statement duly supported by an affidavit swearing to the facts contained in the written statement

(2) That where the employer puts in his appearance and contests the reference order on merits, it amounts to sufficient compliance of rebuttal His case cannot be struck down for want of a formal counter affidavit

(3) Even where a party is absent it is still the duty of the industrial courts to satisfy itself with the case of the union or workmen and make an award only on merits of the case

(4) Any award made straightway on the grounds of absence of the Opposite Party cannot be termed as formal adjudication of a reference order The industrial courts cannot be dictated in what manner it has to function where a party is absent

(5) The sub-rules relating to filing of an affidavit or a counter affidavit are an excessive exercise of power and illegal The industrial courts should take no notice of the same The UP Govt must ween the Act of dead wood and keep it updated

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BOOKS REVIEWED

CHAWLA'S ELECTIONS LAW AND PRACTICE FOURTH EDITION, 1991 (WITH SUPPLEMENT) By Mr Justice V S Deshpande Former Chief Justice, Delhi High Court, Former Executive Chairman, Indian Law Institute & Dr Kiran Jain, Asstt Research Professor, Indian Law Institute, New Delhi Published by Sanjiv Malhotra. For Bahri Brothers 742 Lajpat Rai Market, Delhi 11006 Pp 40 + 1016 Price Rs 360=00

Since the third edition was publised this subject has attracted a greater attention from all sides A lot has been amended and added in the Representation of the People Acts 1950 and 1951 These Acts provide the base line for free and fair elections in our country Such constitutional provisions vis a vis election have been magnified detailed and the new ways have been suggested to wipe out the lacunae of the present Act Important case law has come into being since the publication of the last edition of this work The recently evolved casse laws (till 1991) have been assimilated by the author Four new topical chapters have been added in this edition — (1) Political parties and Election Symbols (2) Jurisdiction of Courts to try election cases (3) Evolution of Anti Defection Law (4) A member's disqualification by Defection These areas of election have of late acquired more importance in view of their greater incidence and impact on society owing to the rapid pace of development urbanisation and industrialisation Various topics have been discussed in 14 different parts Extract from the various Acts and Rules and Orders under the constitution have been given under Parts VIII and X respectively Part XIV — Miscellaneous — explains Model Code of Conduct for the guidance of Political parties and candidates The author has taken due care to include almost all the latest decisions of the High Courts as well as the Supreme Court The book assumes proportion of ocean of information about election Laws It contains vast and various collections of up to date and valuable information on Election Laws The author has rendered most useful service to young generation by the publication of this book The book is very useful to all concerned For the various political parties and candidates the book is as indispensable as food It's a book worth possessing indeed

Mrs K J K

COMMENTARIES ON — U P REGULATION OF BUILDING OPERATIONS ACT, 1958 AND U P URBAN PLANNING AND DEVELOPMENT ACT, 1973 AND OTHER COGNATE ACTS (WITH RULES, REGULATIONS, ORDERS, BYELAWS AND NOTIFICATIONS) 2ND EDITION 1991 (IN HINDI) By Uma Shanker, B A LL B, (Gold Medalist), Advocate and Retired Joint Secretary Legislative Assembly U P, Published by Estern Book Company Law Publishers and Booksellers, 34, Lalbagh, Lucknow 226001 Pp 4 + 779 Price Rs 200/

To have a shelter is the prime need of the human being with the growth of civilisation the enhancing necessity for regulation of building operations started gaining more importance The book under review is written in Hindi and it relates to the laws relating to Building operation and Urban Planning and Development law Author in 1980 wrote this book in English first and seeing the demand and utility of the book he decided to write it in Hindi also Besides the two main Acts, various other Acts and Rules have also been included by the author in this commentary For the convenience of the readers up to date amendments have been incorporated and for making the book more useful various notifications also have been reproduced The book is authentic and reliable and those concerned with the subject will find it very helpful to understand the subject The Table of Cases and the definitions of the various terms used often in Acts etc given at the end have increased the utility of the book For the members of the Bar and Bench advocates all other concerned officers and even to the layman the book will serve as a practical guide to solve their problems with ease

Mrs K J K

UTTAR PRADESH GOVERNMENT SERVANT CONDUCT RULES, 1956 4TH EDITION 1991 By B N Upodhyaya Advocate Published by eastern Book Company Law Publishers and Booksellers 34, Lalbagh, Lucknow 226001 Pp 15 + 159 Price Rs 50/

In this book the author deals with U P Govt Servant Conduct Rules 1956 in all possible aspects All the amendments to the Rules have been incorporated at proper places Relevant case law also has been discussed at relevant places It takes note of large number of cases decided by the High Courts as well as Supreme Court The treatment of the subject has been very lucid and the same has been discussed in such a way to bring out the salient features of the Govt Servants Conduct Rules 1956 The book is provided with a very useful index at the end besides a Table of Cases to help the busy lawyers to pinpoint The point on which they need information while dealing with litigation of their clients The book deserves an appropriate place in the law library and the libraries of lawyers and students

Mrs K L K

PRECEDENT IN THE INDIAN LEGAL SYSTEM 1991 By Dr A Lakshmi Nath LL M Ph D , Published by Eastern Book Company, Law Publishers and Booksellers, 34-Lalbagh, Lucknow, Page XVI + 3215 Price Rs 125=00

This book the author says is intended for sincere law students and such lawyers as may wish to acquire knowledge of the working of case law of precedent It will stimulate an awareness of issues problems and ways of analysing and approaching them in the broad filed of law Courts and judges This book is a general introduction to one of the sources of law materials in the common law world viz precedents It is essentially concerned with the operation of the doctrine of judicial precedent at the level of the Supreme Court We at the present day regard the judicial decisions as binding on the Courts as the result of the developments of the 19th Century For the judicial development of law the use of precedent is recognised as an indispensable foundation so that the rational development of law is not hampered

This work of the learned author traces the historical background of precedents to its present day development and importance, and the circumstances under which it can be overruled also This is a fine informative work in which the author has cited English and the Indian decisions It is an excellent valuable addition to legal literature

L K K

MAYNE'S TREATISE ON HINDU LAW AND USAGE (ALSO CONTAINING COMMENTARIES ON — THE HINDU MARRIAGE ACT, 1955, THE HINDU SUCCESSION ACT, 1956, THE HINDU ADOPTIONS & MAINTENANCE ACT, 1956, THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956, THE HINDU WOMEN'S RIGHT TO PROPERTY ACT, 1937) 13th Edition, 1991 Revised by Justice Alladi Kuppuswami Published by Bharat Law House, 222 Tarun Enclave Pitampura, New Delhi Pages 139 + 1288 Price Rs 380=00

Mayne's treatise on Hindu Law & Usage has always been accepted as a classic on the subject and is supposed to be the most authentic source of knowledge on this branch of law The book also contains an exhaustive comprehensive and section wise commentary on — The Hindu Marriage Act 1955 The Hindu Succession Act 1956 The Hindu Adoptions & Maintenance Act 1956 The Hindu Minority and Guardianship Act 1956 and the Hindu Woman's Rights to Property Act 1937

The book gives several interpretations up-to date amendments and their effect on the original law It analyses in a lucid language The entire Hindu Law under separate heads is an exhaustive manner

The book is a must for the Bench and the Bar and anyone concerned with Hindu Law

L K K

The Hon'ble Mr Justice
S C VERMA
Judge Allahabad High Court

Born in the family of Educationists on 2 2 1938 After passing B Sc and then LL B in 1959 from the Allahabad University he deviated from the family business of Printing and Publishing and took to the profession of law Joined the chamber of late Sri Jagdish Swaroop and thereafter joined the chamber of Sri H N Seth Advocate as he then was

In November 1971 was appointed as State Law Officer on the Civil Side and conducted important cases on behalf of the State on Civil Constitutional and tax side Resigned in 1981 and opted for private practice Worked as Senior Counsel of the U P State Electricity Board as also for U P Avas Evam Vikas Parishad Was appointed counsel by many corporations and local bodies. Also worked as a counsel for U P Pollution Board and U P State Industrial Development Corporation Keen Sportsman who took deep interest in activities for good of the public at large Took oath of his office as a Judge of the Allahabad High Court on 23rd August, 1990

END

1991 ALL L J 545

A P MISRA AND R R K TRIVEDI JJ

Vyapar Mandal Mauaima Town, Petitioner v State of U P and others Respondents

Civil Misc Writ No 16959 of 1990 D/-27-11-1990

(A) U P Town Areas Act (1914), S 38(2) and Ss 14, 15A, 15B (as inserted by Act 23 of 1950) — Extension of Municipal Act to town area — Inconsistency between municipal Act and Town Area Act — Municipal Act to prevail in view of S 38 — Rule under S 38 will however not apply to amendments made to Town Area Act subsequent to extension — Imposition of Tahabazari — Provisions of Ss 15A and 15B of 1914 Act providing for procedure of imposition introduced subsequently would, therefore, apply (Para 7)

(B) U P Town Areas Act (1914) (as amended by Act 23 of 1950), Ss 14, 15A, 15B — Tahabazari — Imposition of — Word 'Tax' includes Tahabazari — Procedure prescribed under Sections 15A and 15B of Act not followed — Imposition of Tahabazari is illegal (Para 14)

Cases Referred Chronological Paras

(1990) 2 UPLBEC 813 (1990) 2 JT 68 (SC) 9
1990 All LJ 935 1990 All CJ 671 9, 12
1987 All LJ 1498 1988 UPLBEC 258 11 13
1984 UPLBEC 1110 10
1980 All LJ NOC 21 1980 UPLBEC 369 11

S Farman Ahmad for Petitioner Standing Counsel for Respondent

A P MISRA, J — The present writ petition is directed for a writ of certiorari to quash the draft proposal (Annexure 1 to the petition) and further directing the respondent Nos 1 to 3 not to realise the taxes on the basis of draft proposal

2 We have heard learned counsel for the parties the challenge to the said imposition of tax of Tahbazari has been made by the petitioner on a number of grounds The main ground has been that the State Government has not yet issued any gazette notification regarding the said imposition and in its absence such imposition is illegal

3 The impugned resolution has been passed by the Town Area Mauaima constituted under the U P Town Areas Act 1914 (hereinafter referred to as the Act) Under Section 14 of the Act a Town area committee is empowered to impose a tax upon the rent received by the proprietor or under proprietor taxes upon the trades, fees for licencing hackney carriages and other fees including Tahbazari which is subject matter of question in the present case In this petition, we are concerned with the imposition of Tahbazari leviable under Section 14(2)(b) of the Act Section 14 (2)(b) is reproduced below

14(2)(b) Tahbazari leviable for the use of public land or public roads

In the present case, Tahbazari was levied by the Town Area Mauaima by means of notification dated 9th March, 1990 under which the taxes which were payable previously were enhanced according to the petitioner, unreasonably and without any authority of law

4 The main contention on behalf of the petitioner is that the imposition of the said Tahbazari could only be made by complying with the procedure as laid down under Sections 15-A and 15-B of the Act It is not in dispute that if that section is made applicable then such a tax would be effective only if there is approval by the State Government Under Section 15A of the Act the town area committee by means of resolution subject to the rules made in this behalf by the State Government specify the tax being one of the taxes described in Section 14 which it desires to impose and further the amount or rate leviable from any person or class of persons liable or to be made liable for the tax The committee prepares draft rules, which it desires the State Government to make in respect of the matters referred to in Section 39 After they are published in the manner prescribed the inhabitants of the town may file objec-

tions and the committee thereafter after taking into consideration the objections filed may finally settle the proposal This draft rule is submitted to the prescribed authority and if there is non, the District Magistrate Thereafter, under Section 15B the said authority may either reject the proposal or sanction them with or without modification and that draft rule is forwarded to the State Government The State Government then frames rules in terms of the same and forwards it back to the District Magistrate and the committee then through a resolution directs the imposition of tax with effect from the date to be specified According to the petitioner, admittedly this procedure having not been followed, the imposition of Tahbazari under Section 14 of the Act by the respondent Town Area is not sustainable in the eye of law

5 On behalf of the respondent it was contended that in view of the Notification Nos 972/XI-871-E and 974/XI-574-E published in the United Provinces of Agra and Oudh Gazette date April 7 1928 on exercise of the powers conferred by Section 38(1) of the Act, Sections 208(2)F(d) 298(2) H(h) to (1) 251, 299(1), 301(2) and 301(5) of the U P Municipalities Act, II of 1916 have been extended to all the town areas in U P in the modified forms set forth in the aforesaid notification Reliance has been placed on Section 301(2) as modified by the notification, which is reproduced below —

> 'A copy of the bye law, made by the panchayat shall be posted in conspicuous place within the town area, and no bye law shall take effect until it has been confirmed by the District Magistrate '

The only difference is the word ' panchayat" referred therein stands substituted by Act II of 1934 The argument on behalf of the respondent in view of this is that the procedure as prescribed under the amended U P Town Areas Act, which has been made applicable to the town areas has been followed in this case and in view of this the challenge by the petitioner to the said imposition of tax, if approved by the District Magistrate, is not sustainable

6 It is significant that Sections 15A and 15B have been introduced by means of Section 4 of U P Act XXIII of 1950 The question which comes up for consideration is whether after the introduction of the aforesaid provision Section 301(2) still holds good for the purpose of imposition of impugned Tahbazari as tax or fee or not Learned counsel for the respondents relied on Section 38(2) of the Act which reads —

> "where any enactment is so extended, any provision of this Act inconsistent with such extension or declared in the aforesaid notification to be inoperative shall cease to have effect so long as the extension is in force "

It was urged since that notification and the extension is in force even now, therefore there being inconsistency between the procedure as mentioned under Sections 15-A and 15B of the Act and the procedure under Section 301(2) as aforesaid the earlier procedure under Section 15-A and 15B will not hold good

7 Having given our considered opinion we are of the view that this contention on behalf of the respondent is not sustainable The language used in Section 38(2) of the Act is 'where any enactment is so extended, any provision of this Act inconsistent with such extension to be inoperative This will be applicable to all the enactments existing on the date when the notification came into play However it would not be available to the subsequent amendments made in the said enactment Therefore, the contention, to the extent of inconsistency in the procedure of Sections 15-A and 15-B with Section 301(2) of the U P Municipalities Act being not applicable is not sustainable As we have said above that such an interpretation is not possible on the language of Section 38(2) itself Admittedly, Sections 15-A and 15B of the Act being introduced by means of an amendment brought in 1950, while the said notification was issued in the year 1928 the subsequent modification in the enactment would not be held to be inconsistent and inoperative in view of Section 38(2) of the Act

8 The next argument raised on behalf of the respondent was that the procedure as prescribed under Sections 15A and 15B only speaks about taxes and, therefore, under Section 14 what is not a tax, which, according to the respondent even Tahbazari is not a tax, the procedure prescribed under Section 15B of the Act would not be applicable, but the procedure as laid down under Section 301(2), as aforesaid would be applicable

9 On the other hand, learned counsel for the petitioner urged that the Tahbazari is, in fact, a tax and therefore, the procedure prescribed under Sections 15-A and 15-B should be followed On behalf of the petitioner reliance has been placed on the case of Udyog Vyapar Mandal v Shyam Sunder 1990 All CJ 671 (1990 All LJ 935) in which it was held (at p 936 of All L J)

> The term taxes in the context in which it appears, has been used in a comprehensive sense so as to include all imports enumerated in Section 14 tahbazari being one of the taxes listed in Section 14 would thus clearly be covered by Section 15-A A combined reading of Sections 14 and 15-A therefore leads irresistably to the conclusion that the procedure laid down under Section 15A of the Town areas Act would be equally applicable to the imposition of Tahbazari”

Reliance was also placed in the case of Sri Krishna Das v Town Area committee, Chirgaon (1990) 2 UPLBEC 813 (SC) in which it was held —

> A fee is paid for performing a function A fee is not ordinarily considered to be a tax If the fee is merely to compensate an authority for services performed or as compensation for the services rendered, it can hardly be called a tax However, if the object of the fee is to provide general revenue of the authority rather than to compensate it, and the amount of the fee has no relation to the value of the services, the fee will amount to tax”

However, we want to make it clear that so far in this case nothing has been pleaded, nor there is anything on record to come to the conclusion whether the impugned fees was placed in the general revenue or not Therefore, it is not possible for us to come to any conclusive finding in this regard

10 Next, reliance was placed in the case of Rahmat Ali v The Town Area Committee Bahadurganj, District Ghazipur, 1984 UPLBEC 1110 While dealing with Sections 14 15 15A and 15-B of the Act the following observation was made —

> 'If there is a challenge to the validity of the tax, the Town area committee is under an obligation to prove that the necessary steps were taken for framing the rules and the procedure laid down in the Act was complied with, where it was not followed and the date of imposition of tax was not published in the manner prescribed, the imposition of tax cannot be upheld

The proposition in this case can never be doubted, nor any stand contrary has been taken on behalf of the respondents

11 Reliance was also placed in the case of Oriental Glass Works v Municipal Board, Firozabad, (1980 UPLBEC 369 (1980) All LJ NOC 21) in which it was held

> “A fee is generally defined to be a charge for special service rendered to individuals by the Government or some other agency like a local authority or statutory corporation The amount of fee is supposed to be based on the expenses incurred by the State in rendering the service
>
> Two elements of essentials in order that the payment may be regarded as fee, i e firstly, it must be levied in consideration of certain services which the individual accept either willingly and in the second place, the amount collected must be earmarked to meet the expenses of rendering the services and must not go to general revenue of the State to be spent for general public purposes

As we have said above, in the present case there is neither any pleading, nor there is anything on the record to come to the conclusion whether the services rendered was earmarked or whether it went in the general revenue or not The proposition laid down in the aforesaid decision is merely a distinction between tax and fee on which there is a catena of decisions even by the Supreme Court and this Court In this regard main reliance was placed on behalf of the respondent in the case of Ali Hasan v Zila Parishad Etawah 1988 UPLBEC 258 1987 All LJ 1498 This is again a case where a detailed summarisation has been made of various authorities regarding distinction between tax and fee This was a case under U P Kshettra Samitis and Zila Parishads Adhiniyam where levy of Tahbazari as ground rent of stall in a market was in question and it was held that such a levy was not illegal and a distinction has been made between tax and fee

12 However we are not satisfied with the aforesaid citations as the question involved in the present case is not fully covered by any of the decision relied upon by the learned counsel for the parties except Udyog Vyapar Mandal v Shyam Sunder (1990 All LJ 935) (supra)

13 On behalf of the respondent, it was urged that a finding has been recorded that the Tahbazari is a tax, but no reasons have been recorded for holding the same and therefore reliance was placed on behalf of the respondent on the basis of decision in Ali Hasan v Zila Parishad (supra) Tahbazari would be a fee and it would not be covered by the meaning of the word "tax and thus the imposition of Tahbazari would be valid as it does not require the procedure as laid down under Section 15A of the Act

14 However, looking to Chapter III of the Act we find that in Section 14 of the Act and the heading uses the words "imposition of town tax Before it, Chapter III is headed with words "taxation and Town fund We find, Sections 14 to 21 deal with various forms of taxation Thereafter there is a heading again Town fund starting from Section 22 to Section 25 Thus, this chapter has been splitted into two parts, one dealing taxation and the other dealing town fund We further find that the imposition of tax in this case has been prescribed under various sub-headings, but significantly Section 14 (2) provides for taxes and fee and in fact Section 14(2) (a) (c) and (d) all start as fees except 14(2)(b) which deals with Tahbazari leviable for the use of public land or public roads The question arises whether the procedure of Section 15-A of the Act would be confined only to Section 14(1) or it will be applicable to both Section 14(1) and 14(2) which includes fees also It is significant that in Section 14(2) the legislature used the words the committee may also impose the following taxes and fee" The words Taxes and Fee are very significant Of this interpretation may be given in two ways either the legislature intended to specify that there are distinction between tax and fee If that be so then except (b) of sub section (2) of Section 14 which describes that the tahbazari leviable for the use of public land or public roads the other sub-clauses of sub-section (2) of Section 14 deal with fee and thus it could be said that tahbazari would be tax The other possible interpretation is that the words tax and fee could be interpolated and by way of clarification this has been used as to include both of them Looking to the concept this Chapter III stating with Section 14 and followed by amendment to Sections 15A and 15 B procedure for altering taxes Section 15 D abolition or modification of tax and its assessments etc by the State Government Section 16 exemption from tax Section 17 publication of assessment list in respect of tax Section 18 appeals from assessment or levy of tax Section 19, payment of tax Section 20 dealing with writ of demand and Section 21 recovery of arrears of tax, all deal with taxation Thereafter, town fund starts with Section 22 to Section 25 Thus, we feel it is not possible to give interpretation that if the entire sections from 14 to 21 are in respect of tax, but the legislature intended to exclude Tahbazari for the purpose of procedural law to be excluded from this chapter to be imposed by means of Section 301 (2) as modified by the aforesaid notification in the year 1928 We are deliberately not going into the question whether Tahbazari in strict sense is a fee or tax as has been stated by the parties but we come to the

conclusion even if it could be said to be fee then not only sub-clause (b) of Section 14(2) but all sub-clauses (a) (c) and (d) of Section 14 (2) would all be cases to be covered with taxes and a procedure for the purpose of taxation would be as laid down under Sections 15A and 15B Therefore the meaning of the word Tax for the purpose of Chapter III in Section 14 would be to include Tahbazari also and therefore it is incumbent on the respondent town area to follow the procedure as prescribed under the aforesaid two sections Coming to the said conclusion, we fell and accordingly quash the imposition of tax by the town area Mauaima as in the present case it is not in dispute even by the respondents that the procedure as prescribed under Sections 15A and 15 B having not been followed in this case the imposition of tahbazari by the Twon Area is illegal and not sustainable in the eye of law

15 We accordingly quash the imposition of tax by the respondent in pursuance to the proposed draft mentioned in Annexure I However we make it clear that this is without prejudice to the right of respondent town area to levy the said tax by following the procedure as laid down in Sections 15A and 15B of the Act We further make it clear that if any tax has been imposed and realised by the Town area in pursuance to the said notification issued by the respondent Town Area it is open to the petitioner to apply for refund of the same to the said authority and the respondent will refund the same in accordance with law

16 With the aforesaid observations this petition is allowed Costs easy

Petition allowed

1991 ALL L J 549

M L BHAT J

Govind Laxman Solapurkar Applicant v Dattaraya Damodar Kelkar Opposite Party

Civil Revn No 431 of 1987 D - 13-2-1991

Evidence Act (1872), S 114 — Adverse inference — Non-production of best evidence — Demand neither made by other party nor Court directed to produce such evidence — Adverse inference cannot be drawn

If a party in whose possession best evidence is available and despite Court s direction he fails to produce the same or despite the demand from the other side it refuses to produce the same the Court will be well within its jurisdiction to conclude that had such evidence been produced it would have gone against the person who had suppressed it and an adverse inference could be drawn against that person But a casual statement of the landlord that he had made entries in the diary in respect of rent and he not being directed to produce the diary at any stage the non-production of diary would not bring him within the penal consequence of S 114(J) of the Evidence Act and no adverse inference can be drawn against the landlord (Para 7)

Cases Referred Chronological	**Paras**
(1989) 1 All Rent Cas 550	4
AIR 1981 SC 977	5
AIR 1967 SC 1134	3

Wajahat Husain Khan for Applicant Sri Aditya Narain for Opposite Party

ORDER — The only point that falls for consideration is whether the court below was justified in drawing an adverse inference againsts the landlord-revision-petitioner and on the basis of that adverse presumption suit of the plaintiff for arrears of rent in part could be dismissed

2 The trial court has opined that revision-petitioner has failed to produce the

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DI, EI. A430/91 MPP

diary in which some entries regarding receipt of rent were made and the diary was the basis of the suit and had the diary been produced the entries noted therein would have gone against the revision-petitioner Therefore, an adverse presumption is drawn and the claim for rent in part is rejected on that basis In this way the claim for an amount of Rs 3400/- was rejected which according to the revision-petitioner was payable to him and for the payment whereof he had given notice to the defendant As a result of this finding the trial court has dismissed the suit for ejectment also

3 Learned counsel for the revision-petitioner submitted that the diary was not basis of the suit nor had plaintiff relied on that diary A casual statement was made by him in cross-examination that entries were made by him in the diary He was not asked to produce the diary According to the plaintiff diary being not basis of the suit and there being no order to him to produce the diary, the court below could not have drawn adverse inference if the said diary was not produced He has relied on AIR 1967 SC 1134 Ramrati Kuer v Dwarika Prasad Singh the Supreme Court while dealing with the provisions of Section 114 of the Evidence Act has observed that if a party fails to produce the accounts and gives only oral evidence and the opposite party did not make any demand to call for accounts, even if that is best evidence, at the most the court can reject the oral evidence but no adverse inference can be drawn from non-production of accounts

4 Reliance is also placed on (1989) 1 All Rent Cas 550 C P Kapoor v Rajendra Kumar Gupta It has been held that where a party had merely stated that he had made endorsement of rent in his diary, mere non-production of such diary was not sufficient for drawing adverse inference against him unless he is asked to produce it

5 Learned counsel for the opposite parties also cited a Supreme Court's authority reported in AIR 1981 SC 977 Khushalbhai Mahijibhai Patel v A firm of Mohammadhusain Rahimbux which also deals with the question of Court's power to draw an adverse inference This was a case in which defendant had alleged that he had purchased goods not from the plaintiff but from certain other firm and had made payment to that firm The Supreme Court was pleased to hold as under (Para 10) —

"If the case propounded by the defendant firm at the trial is correct its account books must be containing entries to the effect that the agreement of purchase of 225 bags of tobacco was entered into with firm R K Patel and not with the plaintiff and that some time in December, 1955, the account of firm R K Patel was credited with the amount of the price of the goods Entries would further be available therein indicating unmistakably the periods for which khudabux was admittedly employed with the defendant firm The non-production of those books by the defendant firm and the production by it of stray letters and a bill constitute failure on its part to produce the best evidence and a presumption has therefore to be raised against it that if such evidence had been produced the same would have gone against the case propounded by it

6 In the present case as already observed at no stage there was a direction by the Court to the plaintiff to produce diary Therefore, he was not bound to produce the same The diary was not the basis of the suit The plaintiff did not claim the amount on the basis of the diary He had alleged that tenant was in arrears and tenant pleaded that he paid the rent Tenant's evidence was disbelieved Burden was on the tenant to prove that he had paid the rent If he had failed to discharge the burden he could not succeed on the ground that the plaintiff did not produce the diary in which entries were allegedly made by him in respect of the receipt of rent If the defendant had demanded production of that diary and thereafter the plaintiff had failed to produce the diary the Court could draw inference but this inference could not still have decided the issue of payment or non-payment of rent in favour of the plaintiff

7 Non-production of the best evidence on which the parties rely could be ground for drawing of presumption by the Court if the Court had given direction in respect of production of such evidence The inference is obvious, if a party in whose possession best evidence is available and despite Court's direction if fails to produce the same or despite the damand from the other side it refuses to produce the same the Court will be well within its jurisdiction to conclude that had such evidence been produced it would have gone against the person who had suppressed it an adverse inference could be drawn against that person But in the present case there is nothing of this type on which the Court was justified in drawing an adverse presumption A casual statement of the revisionist that he had made entries in the diary in respect of rent and he not being directed to produce the diary at any stage would not bring him within the penal consequence of Section 114 (J) of the Evidence Act

8 The findings of the court below, therefore, are not justified and they are against the provisions of law No adverse inference can be drawn against the revision-petitioner The result is that this revision deserves to be allowed and the findings of the court below are liable to be set aside

9 Accordingly, the revision petition is allowed and the judgment of the court below dismissing the claim of the petitioner for arrears of rent to the tune of Rs 3400/- is hereby set aside and the case is sent back to the trial court for deciding the same in accordance with law in the light of the observations made hereinabove Learned counsel for the parties shall cause the presence of their clients before the court below on 26th March 1991

Revision Petition allowed

1991 ALL L J 551

M L BHAT, J

Ram Chandra deceased by LR s and others, Petitioners v IXth Additional District Judge Varanasi and others Respondents

Civil Misc Writ Petn No 19015 of 1988 D/-9-4-1991

Civil P C (5 of 1908), O 9 R 13 — Provincial Small Cause Courts Act (9 of 1887), S 17 — U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S 30 — Ex parte decree for ejectment — Setting aside — Application for — Applicant depositing only part of decretal amount — Application held not maintainable

Where petitioner filed an application for setting aside ex parte decree of ejectment passed against him and the petitioner has deposited only part of the decretal amount and petitioner has alleged to have deposited amount under Sec 30 of U P Urban Buildings (Regulation of Letting Rent and Eviction) Act 1972 and the said proceedings are pending between petitioner and erstwhile owner of the property and the present respondent is not party to those proceedings and there was no refusal on part of respondent to accept rent, held, deposit of part of the amount is not compliance of proviso to S 17 and application for setting aside, held not maintainable (Para 8)

Someshwari Prasad and J K Srivastava, for Petitioners, Standing Counsel, for Respondents

ORDER — An ex parte decree for ejectment came to be passed against the petitioner-tenant on 14-3-84 by the trial court On 3-7-84 the petitioner filed an application under O 9 R 13 C P C for setting aside the ex parte decree dated 14-3-84 The application of the petitioner for setting aside the exparte decree has been rejected by the court below The petitioner challenges the said order through the medium of this writ petition

2 It is avered by respondent No 3 that

the arrears of rent were claimed in the suit from 1-4-83 to 15 9-83 at the rate of Rs 32/- per month The property seems to have been purchased by the respondent No 3 on 30-3-83 Total rent from the date it fell due to the date of institution of the application under O 9 R 13 C P C comes to Rs 484/- The petitioner is said to have deposited Rs 271/- only The petitioner is said to have deposited Rs 1228/- under S 30 of the U P Urban Buildings (Regulation of Letting Rent and Eviction) Act 1972 hereinafter referred to as Act No 13 of 1972 The said proceedings are pending between the erstwhile owner of the property and the petitioner Respondent No 3 is not party to those proceedings

3 Respondent No 3 supported the judgment of the court below on the ground that the petitioner had deposited only Rs 271/- on account of decretal amount out of Rs 484/- which was outstanding against him upto 3-7-84 when the application under O 9 R 13 C P C was filed by him The deposit is said to be not valid Therefore in terms of S 17 of the Small Cause Courts Act the court below was perfectly right in dismissing the application of the petitioner for setting aside ex parte decree It is further stated that any deposit made by the petitioner in different proceeding in the name of different persons cannot be said to be valid deposit by the petitioner so as to get the benefit of S 17 of the Small Cause Courts Act It is avered that rent was payable to respondent No 3 Therefore deposit could be made in his name after satisfying the conditions of S 30 of the Act No 13 of 1972 There was no refusal on the part of respondent No 3 to accept the rent which was tendered to him Therefore S 30 of Act No 13 of 1972 could not come into play against respondent No 3 That being so the theory of deposit set up by the petitioner is of no consequence because the petitioner has not deposited any amount in the name of respondent No 3 and has not tendered any amount to him

4 There have been some mis-calculations about the amount of arrears of rent by the court below Learned counsel for the parties agreed before me that the rent due was from 15-9-83 to 3-7-84 i e Rs 308/- and the arrears upto 15-9-83 Rs 176/- in all Rs 484/- only were due and payable to respondent No 3 on account of rent Admittedly against this amount Rs 271/- has been deposited Balance amount has not been deposited in the name of respondent No 3 If any amount is deposited by the petitioner that is not in the name of respondent No 3 nor is that before the filing of the application for setting aside the exparte decree

5 Proviso to S 17 of the Small Cause Courts Act reads as follows :—

Provided that an applicant for an order to set aside a decree passed ex parte or for a review of judgment shall at the time of presenting his application either deposit in the Court the amount due from him under the decree or in pursuance of the judgment or give such security for the performance of the decree or compliance with the judgment as the Court may on a previous application made by him in this behalf have directed

6 As stated above the petitioner neither deposited the amount due from him under the decree nor gave any security for the performance of the decree after obtaining permission from the Court The proviso to S 17 therefore has not been complied with by the petitioner in this case

7 The petitioner submitted that if at all there was any mistake in depositing the rent that was bonafide and the petitioner should not suffer for his bonafide mistake It is urged that when the property was purchased the petitioner was not in know of the transfer of the property by its erstwhile owner in favour of the present landlord That misled the petitioner and he deposited rent under S 30 of the Act No 13 of 1972 in different proceedings which were started between the petitioner and the erstwhile landlord

8 The petitioner seems to have made a feable attempt on 7-11-84 to tender the rent by making an application He had volunteered to deposit the rent on being informed if there was any amount due and the whose name it

was to be deposited This application will not cure the defect because deposit of the amount due from the petitioner under the decree was to be made at the time of presentation of the application under O 9 R 13 C P C No deposit was made either before presentation or at the time of the presentation of the application under O 9 R 13 C P C Consequently the application filed by the petitioner on 7-11-84 would be of no value because it is not an application under the proviso to S 17 of the Small Causes Courts Act The petitioner was aware about the amount which was due against him under the decree and he was also aware that he has only made a valid deposit of Rs 271 - out of the amount determined by the decree against him and he was all along represented by his counsel Therefore it cannot be said that the petitioner has made any bonafide mistake It is pertonant to mention that the application for setting aside the exparte decree was made by the petitioner against the present landlord therefore he could not be heard to say that on the date of presentation of the application he was not aware as to who was the landlord or there was transfer of ownership by the erestwhile landlord in favour of the present landlord There is no compliance with the proviso to S 17 Deposit of part of the amount is not compliance of S 17 Therefore the application under O 9 R 13 C P C was filed without depositing the amount due under the decree Such an application was correctly held as not maintainable by the court below

9 I find no error in the impugned order and it is not a fit case in which this court can interfere with under Art 226 of the Constitution of India The impugned order does not suffer from any infirmity The petition as such is liable to be rejected

10 For the reasons given in the foregoing paras of this judgment the writ petition fails and is dismissed However there will be no order as to costs

11 The interim order dated 3-10-88 and 21-7-89 shall stand vacated Any amount deposited by the petitioner due from him to respondent No 3 under the decree shall be payable to respondent No 3 if he has not already withdrawn it

Petition dismissed

1991 ALL L J 553

R R K TRIVEDI J

Indrajit Singh Petitioner v State of Uttar Pradesh and others Respondents

Civil Misc Writ Petn No 16115 of 1990 D - 13-11-1990

Arms Act (1959), S 17 — Suspension of Licence — Show cause notice — Licence cancelled on ground not mentioned in show cause notice — Cancellation is violative of principle of natural justice

Constitution of India, Art 14 (Para 5)

A K Awasthi and V C Tiwary for Petitioner Standing Counsel for Respondents

ORDER — Notice of this writ petition was given to the learned Standing Counsel on 7th June 1990 However no counter affidavit has been filed As the writ petition can be disposed of on a short legal question The learned standing counsel has agreed that a counter affidavit is not necessary in the facts and circumstances of the case The parties counsel are agreed that this writ petition may be disposed of finally at this stage

2 Petitioner is a licencee for S B B L Gun under which he purchased S B B L Gun No 2840 Petitioner was served with a show cause notice dated 19-12-1984 as to why his licence may not be cancelled By this notice, the licence was suspended The notice has been filed as Annexure No 1 to the writ petition In this notice only one criminal case detailed as Crime No 307/84 under Sections 302 and 307 I P C has been mentioned The petitioner filed his reply in which he stated that he has already been acquitted in the case mentioned in the notice and there is no ground for cancelling his licence In his reply

he also stated that his village is 12 Kms away from the police station Baberu and the keeping of the gun is necessary for the protection of his life and property The respondent No 2 by his order dated 18th February 1988 Annexure No 3 to the writ petition cancelled the licence of the petitioner The respondent No 2 has relied on a criminal case under Sections 451 504 and 506 I P C for cancelling the licence on basis of the affidavit filed by police Sub Inspector It is pertinent to note here that about this no supplementary notice was served on the petitioner calling upon him to give his explanation about the alleged case

3 Aggrieved by the order of the respondent No 2, the petitioner filed an appeal before the respondent No 1 At appellate stage he filed the copy of the order dated 11-9-1981 showing that he was acquitted in Sessions Trial No 17 of 1980 arising out of Crime No 306 of 1984 The respondent No 3 dismissed the appeal by his order dated 23rd April 1990 relying on the same criminal case under Sections 451, 504 and 506 I P C

4 Aggrieved by the order of the respondent No 3 the present writ petition has been filed for quashing the aforesaid orders

5 I have heard learned counsel for the petitioner and learned Standing Counsel In my opinion, the writ petition deserves to be allowed on the ground that respondent Nos 2 and 3 were not legally justified in basing their orders on a fact which was not mentioned in the show cause notice Such a course adopted by the respondent Nos 2 and 3 is violative of principle of natural justice Petitioner has categorically stated before respondent No 2 that no criminal case is pending against him No particulars of the criminal case of the police station or the crime number has been mentioned in the order The petitioner could not in such a circumstance be expected to submit reply or explain of such vague allegation It was obligatory on the respondent No 2 to serve an additional or supplementary show cause notice on the petitioner mentioning the alleged new ground proposed to be used against the petitioner for cancellation of the licence The respondent No 2 could not use the information supplied by the police by means of a notice or the affidavit during pendency of the case Even if he was informed by affidavit or by not about the pendency of the criminal case he ought to have immediately served a supplementary notice on petitioner calling for a reply Without adopting such a course the respondent No 2 could not legally reply on the alleged fact The respondent No 3 while deciding the appeal has ignored this material aspect of the case Causing a serious prejudice to the petitioner The petitioner has also invited my attention to paragraphs 9 and 10 in which he has stated that in case under Sections 451 504 and 506 I P C a compromise was filed duly arrived at between the petitioner and the informant The alleged case is of 1977 the show cause notice was served on the petitioner in 1984 The case remained pending for 7 years and it never occurred to the authorities to cancel the licence of the petitioner on basis of the alleged case As already stated above the orders passed by the respondent No 2 was in violation or principle of natural justice and could not be sustained The respondent No 3 illegally dismissed the appeal of the petitioner without considering the aforesaid material aspect of the case

6 For the reasons stated above the writ petition is allowed and the impugned orders dated 18-2-1988 and order dated 23-4-1990 passed by respondent Nos 2 and 3 respectively are hereby quashed There will be no order as to costs

Petition allowed

1991 ALL L J 555

= 1990 Cri L J 2731

S I JAFRI J

Bachnu and others Appellants v State of U P Respondent

Criminal Appeal No 406 of 1979, D/- 19-4-1990 *

Penal Code (45 of 1860), S 300 — Murder — Evidence — Appreciation of — Right to private defence — Incident of watering of fields — Accused causing injuries to complainant party in exercise of right of private defence proved by evidence — Prosecution witnesses not inspiring confidence and truth fulness and not worthy of reliance — Conviction set aside (Para 15)

G C Saxena Anil Mullick, Keshav Sahai for Appellants Addl Govt Advocate for Respondent

JUDGMENT — This appeal has been preferred by Bachnu Veer Singh, Rishipal and Chander-impugning their conviction and sentences recorded by Sri D D Srivastava, III Addl Sessions Judge Meerut by means of his judgment and order dated 22-1-1979 in S T No 468 of 1977 Severally their conviction and sentences were — Rishi Pal was convicted under Sections 304 Part II I P C 324/34 and 323/34 I P C and he was sentenced to undergo R I for 7 years 3 years and one year under the aforementioned Sections of the Penal Code respectively The remaining appellants namely Bir Singh Bachnu and Chander were convicted under Section 323/324/34 I P C and were sentenced to undergo R I for one year and two years respectively under the aforementioned Sections of the Penal Code

2 Appellants and the complainant Vijai Pal P W 4 both belonged to village Samaspur Surani P S Sardhana District Meerut Ram Pal deceased and his father Brahma Singh had some cultivatory land in the aforesaid village On the day of incident i e 5-2-1977, Ram Pal and his father were watering their fields since 8 p m and their turn was to last up to 11 40 p m Vijai Pal son of Brahma Singh also joined his father and brother in watering the field At about 10 p m , the flow of water declined upon which Brahma Singh P W 6, father of Vijai Pal complainant and Ram Pal proceeded towards the (Gool) source in order to find out the cause of stoppage of water to the field They found the Gool Blocked and water diverted to another gool Brahma Singh and Ram Pal spaded open the Gool and water started to flow again After half an hour, the water again stopped coming to the field of the complainant whereupon Brahma Singh and Ram Pal again went to the spot and found the Gool again blocked and water diverted to another Gool Brahma Singh again spaded open the Gool and diverted the water to his field After opening the Gool Brahma Singh stayed back at the spot in order to find out as to who on earth was doing this mischief In a short while at about 11 p m accused persons consisting of Bachnu Veer Singh Rishipal and Chander appeared on the spot and out of them Rishi Pal had a spear while the remaining appellants were possessed of Lathies The accused persons started abusing Brahma Singh and also blocked the supply of water to the field of the complainant This action of the appellants was objected to by the father of the complainant, namely, Brahma Singh and brother Ram Pal offended by the repeated objection from the father of the complainant and his brother the accused persons assaulted Brahma Singh and his son Ram Pal by means of spear and lathi It is also the case of the prosecution that during the course of assault, the father of the complainant Brahma Singh and brother Ram Pal had warded off the blows being showered on them and in the melee Rishi Pal accused had also sustained some injuries The hue and cry raised during the course of assault that a number of witnesses were attracted to the scene of occurrence including Jagpal and Yashpal Harijans of the same village and on their intervention, Brahma Singh and Ram Pal were saved from

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* Against judgment and order of D D Shrivastava III Addl S J Meerut, D/- 22-1-1989

GH/GH/A470/90/VSM

further assault by the appellants After the occurrence the appellants bolted away from the scene Injured Brahma Singh and Ram Pal were taken on a tonga to the police station and before the tonga could reach the police station Ram Pal injured breathed his last on the way itself On reaching the Police Station Vijai Pal complainant submitted a written report Ex Ka 5 and on the basis of the said written report a case u/s 302/323/324 I P C was registered against the appellants At this stage it is also worthy of mention that Jag Pal one of the witnesses who had come to intervene in the occurrence also sustained injuries

3 All the injured were sent for being medically examined at Sardhana P H C at P H C Sardhana Dr Brij Mohan Medical Officer in charge examined the injuries on the person of Brahma Singh on 6-2-77 at 12 30 p m and he found the following injuries on his person

(1) Incised wound 1 cm x 0 3 cm x muscle deep on the front and inner side of right upper arm 3 5 cm

(2) Abrasion 0 6 cm x 0 2 cm on the outer side of right fore arm 3 cm below the elbow

(3) Incised wound 4 cm x 0 5 cm x muscle deep on the palm surface of left hand extending the base of the thumb on the inter space between the thumb and left index finger and extending on the web up to the outer side of left hand at the base

(4) Abrasion 1 2 cm x 0 2 cm on the front and inner side of right leg 11 cm below the right knee

4 The autopsy on the dead body of Ram Pal deceased was conducted on 7-2-77 at 4 15 p m at P L Sharma Hospital Meerut and following ante-mortem injury was found on his person punctured wound with clean cut edges 1 5 cm x 1 0 cm right side front of chest lower part Chest cavity deep

5 Another injured witness namely Jagpal was also examined at P H C Sardhana on 6-2-77 at 12 50 p m and the Doctor attending on him found the following injury on his person

Abrasion 1 4 cm x 0 4 cm on the outer side and middle of left leg

6 From the side of appellants three of them have sustained injuries during the course of incident Rishi Pal was examined on 6 2 77 at 7 25 a m by Dr A M Bhartiya and in all he had been recorded to have sustained five injuries on incised wound one lacerated wound one abraded contusion and two contusions Likewise Bachan Singh appellant was also examined at 7 40 a m on 6-2-77 and he was recorded to have sustained five injuries one incised wound one lacerated wound one contusion and two traumatic swellings Chandra Pal appellant was also examined on 6-2-77 at 7 35 a m and he was found to have sustained five injuries — one lacerated wound one incised wound one contusion and two traumatic swelling

7 Genuineness of the injury reports of the appellants was admitted by the District Government counsel under Section 294 Cr P C and hence formal proof thereof was dispensed with

8 The investigation of the case was entrusted to S I Jai Pal Singh P W 9 who after concluding the investigation submitted charge sheet against all the appellants

9 Accused persons pleaded not guilty to the charge framed against them and took the plea that they had been assaulted by the complainant and his men while they were watering their fields on their turn It was further pleaded that they had caused the injuries to the complainant side in exercise of their right of private defence To probabilise the defence version the accused persons examined Pritam D W 1 He denied his having any talk with Vijai Pal supply of water to his field for the time between 8 p m to 11 40 p m The witness also filed documents Ex Kha 1 to Ex Kha 7 Ex Kha 1 is the copy of the statement of Vijai Pal complainant which was recorded by the Investigating officer under Section 161 Cr P C wherein it was stated that the complainant was attracted to the scene of occurrence on hearing the alarm raised by his father and brother and on

reaching the place of occurrence he found Ram Pal his brother and Brahma Singh his father lying injured on the ground Ex Kha 2 is the copy of F I R dated 6-2-1977 filed by Veer Singh at 0 30 a m at P S Delhi gate Meerut Ex Kha 3 is the injury report of Chandra Pal appellant accused Ex Kha 4 is the injury report of Bachan Singh Ex Kha 5 is the injury report of accused Rishi Pal Ex Kha 6 is the certificate from the Executive Engineer (Canals) vouching for the fact that Bachan Singh Appellant had utilised the water for irrigating his field from 11 40 p m to 6 55 a m on the fateful night Ex Kha 7 is also a certificate from the Executive Engineer (canals) vouching for the fact that Dharma son of Hariya father of Preetam Singh D W 1 had also utilised the water for irrigational purposes from 3 99 p m to 11 36 p m on the day of occurrence

10 Now I switch over to examine the case as set up by the prosecution Prosecution examined in all nine witnesses in support of this case and out of them Vijai Pal Singh P W 4 Brahm Singh P W 6 Yashpal P W 7 were examined as ocular witnesses of the occurrence Lekhram P W 5 has been examined to prove the factum of the water allotted to Preetam for the time between 8 p m to 11 40 p m having been sold to Vijai Pal Singh at the rate of Rs 3/- per hour for irrigating his fields

11 First of all I take up that testimony of Brahm Singh P W 6 for scrutiny and appraisal Brahma Singh P W 6 is the father of complainant Vijai Pal Singh and Ram Pal deceased He is himself an injured witness For proper appraisal of his evidence a brief account of his deposition is given below He deposed that while he and his son Ram Pal (deceased) were watering their fields all of a sudden flow of water declined upon which he went to the Gool where he found his gool blocked and water diverted to another Gool He spaded open his Gool and diverted supply of water to his Gool After a lapse of half an hour again flow of water to his field slowed down He again went to the Gool where again he found the Gool blocked and water diverted to another Gool He again diverted the water to his Gool and sat there along with his son Ram Pal for watching as to who was doing the mischief He further deposed at about 11 p m accused persons came at the scene of occurrence and began to hurl abuses at him and his son When he objected to the abuses being hurled at him the accused persons assaulted him and his son by means of spear and Lathies The hue and cry raised by him, attracted a number of witnesses including Jagpal Yashpal and Vijai Pal The aforesaid witnesses intervened in the occurrence Rishi pal appellant inflicted spear on Ram Pal (deceased) which landed in his chest Rishi Pal also assaulted him by means of spear which resulted in injuries to his right shoulders and thumb of his left hand It is also deposed by the witness that during the course of occurrence he managed to snatch the spear of Rishi Pal and wielded the same in his defence and as a result the accused persons also sustained injuries on their person

12 Sri P N Mishra learned counsel for the appellants pressed a number of contentions in his bid to inspire confidence in the defence version and to establish the right of private defence by the appellants Firstly it is contended by the learned counsel that upon a consideration of the serious nature of injuries on the persons of the appellants which is apparent from the injury reports Ex Kha 3 to Kha 5 in which appellants Chandra Pal and Bachan Singh and Rishi Pal had received as many as 15 injuries including incised wounds and lacerated wounds it is more than obvious that the injuries inflicted on the complainant side were the result of the appellants exercising the right of private defence of their persons inasmuch as that on the side of the complainant only one puncutred wound was sustained by Ram Pal (deceased) Brahma Singh (injured) P W 6 has sustained two incised wounds and two abrasions on his persons wehereas Vijai Pal complainant has sustained only one abrasion on his left hand Coming on the next limb of his arguments the learned counsel further submitted that even the manner in which assaults were described by the prosecution is caught in the web of grave doubts While adverting to the

deposition of Brahma Singh P W 6, the learned counsel submitted that according to Brahma Singh, P W 6 he had managed to snatch the spear from appellant Rishi Pal after he had sustained injuries on his person and wielded the spear as a lathi in defence which resulted in injuries to the appellants It is worthy of mention here that no typical spear injury was found on the person of the accused and the facts and circumstances on the record speak eloquently that in order to bring his version in conformity with the nature of injuries on the person of the accused Brahma Singh had introduced in his evidence the factum of snatching the spear from the appellant Rishi Pal and using the same as a Lathi against the appellants It is next submitted by the learned counsel that the story of snatching the spear by Brahma Singh from the hands of Rishi Pal appellant does not appear probable inasmuch as that this factum does not find any mention in the first information report No doubt there is a statement to the effect that it were Ram Pal Brahma Singh who had tried to save themselves from the blows being inflicted upon them

13 Yash Pal P W 7 has also deposed in his statement before the Court that Vijai Pal Singh had snatched lathi from Veer Singh appellant and wielded the same in self defence About Brahma Singh also, he deposed that Brahma Singh had managed to snatch the spear from the hands of Rishi Pal and after snactching the spear, he had plied the same in self defence in order to ward off the blows being inflicted on him

14 Coming to the evidence of Vijai Pal Singh, the learned counsel for the appellants submitted that evidence of Vijai Pal Singh who is the First Informant in the instant case cannot be acted upon as an ocular account of the occurrence inasmuch as that according to Ex Kha 1 it is abundantly clear that he had deposed before the investigating officer under Section 161 Cr P C that he was attracted to the scene of occurrence consequent to the hue and cry of his father and brother and when he arrived at the scene, he found his father Brahma Singh and brother Ram Pal lying injured on the ground During cross examination when confronted with his statement before the investigating officer he gave a trite explanation that he did not give this statement before the investigating officer In view of this glaring infirmity it is difficult to believe that Vijai Pal Singh was an ocular witness of all that had happened at the scene of occurrence and hence his evidence cannot be acted upon for conviction of the appellants in the instant case Having eschewed from consideration the evidence of Vijai Pal Singh P W 4, the conviction recorded against the appellants now rests upon the testimony of Brahma Singh P W 6, father of Ram Pal (deceased) and Yash Pal P W 7 who belongs to the Biradari of Brahma Singh P W 6 The support lent by the above witnesses to the version of the prosecution does not breath life into the prosecution case inasmuch as that having themselves sustained injuries Brahma Singh and Ram Pal would be able to inflict as many as 15 injuries on the persons of the three accused during the course of occurrence The possibility propped up by the learned counsel for the appellants that Ram Pal Brahma Singh Jagpal and Yashpal armed with incised weapons like pharsa and lathies had assaulted the accused persons and inflicted injuries on their persons and retaliating the accused persons in exercise of the right of private defence had caused injuries to the complainant s party cannot be discounted To bolster this probability the learned counsel for the appellant adverted to the statement of Preetam Pal D W 1 in which it was given out by Preetam Pal that he had not consented to the water of his turn to be utilised by Brahama Singh for irrigating his fields Admittedly, the turn of the accused was to commence from 11 44 p m onwards A scrutiny of the entire record nowhere beckons that Vijai Pal Singh had a watch tied to his hand as to be able to pin point the time of occurrence and under the circumstances the possibility that the occurrence had flared up after 11 40 p m when the water of the canal would have been diverted to the fields of the accused cannot be eliminated from consideration

15 To summarise the prosecution has bitterly failed to bring home the guilt to the accused-appellants on the basis of the evidence adduced by the prosecution The defence has succeeded in establishing that the appellants had caused injuries to the complainant party in exercise of the right of private defence The witnesses examined by the prosecution have not acquitted themselves well in inspiring confidence and truthfulness into the prosecution case The prosecution version vis-a-vis the depositions of the witnesses adduced by the prosecution bristles with gaping infirmities and indigestible contradictions and in the conspectus of the above facts and circumstances, the prosecution version is not rendered worthy of being relied upon or acted upon for the conviction of the appellants in the instant case

16 Upon a consideration of the facts and circumstances as propounded above I am of the firm view that the conviction and sentences recorded against the appellants by the trial court cannot be sustained

17 In the result the appeal is allowed The conviction and sentences recorded against the appellants by the trial Court are set aside The appellants are on bail They need not surrender and their bail bonds are discharged

Appeal allowed

1991 ALL L J 559

= 1990 Cri L J 2736

P BASU J

B P Misra Petitioner v State of U P and others, Opposite Parties

Criminal Misc Appln No 1023 of 1988 D/ 28-3-1990

Insecticides Act (1968), S 29 — Offence under — Purchases of substandard insecticides — Managing Director of co operative federation directing purchases of insecticides on orders of his Superiors — No offence by Managing Director under S 29 (Paras 8, 9)

B P Mishra (in person) Jai Singh Prabhakar Bishnoi Sakha Ram Singh Yadav for Petitioner Addl Govt Advocate for Respondents

ORDER — These three petitions under Section 482 Cr P C have been filed by Sri B P Mishra the then Joint Cane commissioner Managing Director U P Cooperative Cane Unions Federation, Ltd Lucknow for quashing of three complaints arising out of three different seizures made by three different persons as detailed hereinafter The prayer contained in these applications is that the complaint as against him in each of three cases should be quashed because the applicant cannot be termed within the meaning of the qualifying clauses enumerated in Section 29 of the Insecticides Act 1968 (hereinafter referred to as the Act)

2 Sri Sakha Ram Singh learned counsel for the applicant and Sri Surendra Singh, learned A G A for the State have been heard at length

3 The Complaint Case No 1247 of 1987 has been instituted by Sri K S Pundir on the allegation that on 13-5-1985 he had inspected a Store at Bhagwanpur, working under the Sahkari Ganna Vikas Samiti, Ltd Iqbalpur at Roorkee Some insecticides and pesticides were seized which were found later as not conforming to the standards laid down under the Act

4 The Complaint case No 1248 of 1987 arises out of an inspection made by Sri K S Pundir on 14-5-1985 at Sahkari Ganna Vikas Samiti Ltd Iqbalpur at Roorkee itself Some insecticides and pesticides were seized which have been found not in accordance with the standard prescribed under the law

5 The Complaint Case No 1246 of 1987 arises out of an inspection made on 16-5-1985 by Sri Rajvir Singh at Sahkari Ganna Vikas Samiti Ltd at Saharanpur Some insecticides and pesticides were seized which have been found not according to the standard prescribed under the Act These three complaints are proceeding in the court of C J M

FH/HH/A370/90/KJK

Saharanpur The three petitions aforesaid relate to the three complaint cases detailed above respectively

6 Sri Sakha Ram Singh learned counsel has drawn the attention of the Court to Section 29 of the Act which reads as under

29(1) Whoever—

(a) imports manufactures sells stocks or exhibits for sale or distributes any insecticide deemed to be misbranded under sub-clause (i) or sub clause (iii) or sub-clause (viii) of clause (k) of Section 3 or

(b) imports or manufactures any insecticide without a Certificate of registration or

(c) manufactures sells stocks or exhibits for sale or distributes any insecticide without any licence or

(d) sells or distributes an insecticide in contravention of Section 27 or

(e) Causes an insecticide the use of which has been prohibited under Section 27 to be used by any worker or

(f) obstructs an Insecticide Inspector in exercise of his powers or discharge of his duties under this Act or the Rules made thereunder shall be punishable

(i) for the first offence with imprisonment for a term which may extend to two years or with fine which may extend to two thousand rupees or with both

(ii) for the second and a subsequent offence with imprisonment for a term which may extend to three years or with fine or with both

(2) Whoever uses an insecticide in contravention of any provision of this Act or any rule made thereunder shall be punishable with fine which may extend to five thousand rupees

(3) Whoever contravenes any of the other provisions of this Act or any rule made thereunder or any condition of a certificate or registration or licence granted thereunder shall be punishable —

(i) for the first offence with imprisonment for a term which may extend to six months or with fine or with both

(ii) for the second and a subsequent offence with imprisonment for a term which may extend to one year or with fine or with both

(4) If a person convicted of an offence under this Act commits a like offence afterwards it shall be lawful for the court before which the second or subsequent conviction takes place to cause the offender s name and place of residence the offence and the penalty imposed to be published in such newspapers or in such other manner as the court may direct

7 It was argued that the allegations in so far as it relates to the applicant are contained only in paragraph 15 of each complaint In Case No 1023 of 1988 translated into English the said averment would read as under

Therefore the seller M/s Sahkari Ganna Vikas Samiti Ltd Iqbalpur at Roorkee (in Case No 1025 of 1988 it is Saharanpur') the Store Incharge and the Secretary i e accused Nos 3 1 and 2 respectively and the producer of the insecticides namely M/s India Pesticides Lucknow its Managing Partner Chemist and Production Manager i e accused Nos 6 4 and 5 respectively and the distributor of Insecticide Establishment U P Sahkari Ganna Vikas Samiti Sangh Ltd Lucknow and its then Manager i e accused Nos 8 & 7 respectively are guilty of offence (Underlining by me)

It was argued that the word distributor as used in Section 29 of the Act refers only to the person who is connected with the manufacture of the insecticides and it is not and should not be interpreted to include a Managing Director of the Federation who was always to act under the orders of the Cane Commissioner U P directing purchases to be made from several companies One by one his directions came Sri Surendra Singh on the other hand relied upon Section 30 also and said that even if Section 29 be interpreted as suggested by the learned counsel for the applicant, it must be left open to the accused to come out with his defence at the trial and in these proceedings under Section 482 Cr P C the relief prayed for cannot be granted

8 After hearing the learned counsel for the parties it is a case where it is apparent that the applicant is not connected, in any way with the manufacture or distribution on behalf and for the manufacturers This distinction must be borne in mind because the purpose of Section 29 appears to be to punish the person who distributed through and on behalf of the manufacturer who indulges in selling an adulterated article or misbranded article in the market Prima facie any Government official or officer empowered to place orders on the basis of specifications and directions of his superiors does not commit an offence under Section 29 only because of having directed said purchases on the basis of the orders placed Consequently the argument of the learned counsel must be accepted that prima facie the applicant does not come within the mischief of any of the words includes in Section 29 of the Act That being the position these applications must succeed

9 These applications are allowed The proceedings as against the applicant in criminal cases Nos 1246 of 1987, 1247 of 1987 and 1248 of 1987 pending before the C J M, Saharanpur are quashed The Magistrate is directed to expeditiously proceed with the trial in accordance with law as regards the other accused The interim orders dated 10-2-1988 are vacated

10 This order shall govern the other connected Crl Misc Applications Nos 1024 and 1025 of 1988 also

Applications allowed

1991 ALL L J 561

= 1990 Cri L J 2738

PALOK BASU, J

Jawahar Lal and another, Appellants v Awadh Bihari and others, Opposite Parties

Criminal Misc Appln No 2389 of 1989, D/- 15-3-1990

Criminal P C (2 of 1974), Ss 145, 146 — Proceedings under S 145 — Attachment of property — Magistrate directing property to be attached two years after initiation of proceedings — Not proper (Para 5)

G N Chandra, for Applicant

ORDER — Heard Sri G N Chandra, learned counsel for the applicants and Shri Rajesh Tandon, learned counsel for the opposite parties

2 The short question involved in this petition under S 482, Cr P C is as to whether the attachment order dated 2-8-88 passed by S D M Duddhi, Mirzapur (now district Sonbhadra) should be given effect to or not

3 It is undisputed that the concerning immovable property, a preliminary order was passed by the S D M concerned on 11-3-1988 There was some police report dt 23-7-88 which was acted upon by the Magistrate in the sense that he proceeded to pass attachment order impugned in this application

4 The further undisputed facts are that when the attention of the Magistrate was drawn to the fact that right from March to August he had not passed an order under Section 146, Cr P C and had thought proper to hear the applicants Jawahar Lal and Rama Shanker in the main proceeding under Section 145, Cr P C, there was no need or justification to pass the attachment order On this, the Magistrate passed an order on 11-8-88 keeping his attachment order in abeyance However the revision filed by Jawahar Lal and Rama Shanker against the orders passed in those proceedings was dismissed by the Sessions Judge This order was interpreted by

the Magistrate that there was enough justification for him to go ahead with the attachment order dated 2-8-88 Consequently he proceeded to pass an order on 13-3-1989, a copy of which has been filed as Annexure-10 to the counter-affidavit through which, he has asked the police to implement the attachment order dated 2-8-88 Hence, this petition was filed by Jawahar Lal and Rama Shanker with the prayer that in the instant case attachment of the disputed property on the materials existing may not be made and that order should be quashed

5 The provisions of emergency attachment as envisaged under Section 146 Cr P C may be invoked only in cases where the Magistrate records satisfaction that but for the attachment of the disputed property the breach of peace is eminent On the facts of the present case it sounds too high to expect that in a proceeding under Section 145 Cr P C which commenced on 11-3-88, the attachment should be directed now i e exactly about 2 years of the initiation of those proceedings The materials existing before the Magistrate do not justify today, the directing of the attachment to proceed further On the facts existing materials may not be interpreted as now a case of emergency Consequently, the impugned direction of the Magistrate as contained in his order dated 13-3-89 directing the attachment of the property has to be set aside But this does not mean that the proceedings under Section 145, Cr P C should not come to its logical end in accordance with law

6 Consequently, this application is allowed The attachment order dated 2-8-88 as re-enforced by the Magistrate's order dated 13-3-89 are quashed with the further direction that he will proceed to decide the impugned petition under Section 145, Cr P C as expeditiously as possible in accordance with law It will be open to the Magistrate concerned to initiate proceedings under Section 146 Cr P C should such material be brought on the record justifying such an order of attachment in case of emergency

Petition allowed

1991 All L J 562

= 1990 Cri L J 2082

(LUCKNOW BENCH)

R K SAKSENA, J

Harihar Chaitanya, Petitioner v State of U P Opposite Party

Criminal Misc Case No 747 of 1988 D/- 2-11-1989

Criminal P C (1974), S 167 — Powers of Magistrate — Accused produced after arrest before Magistrate for detention in judicial custody — Magistrate after looking into contents of FIR can disagree with opinion of police about penal provision which covers case

Where the accused after arrest was produced before the Judicial Magistrate by the Investing Officer for detention for a period of 14 days in judicial custody but the Magistrate on perusal of the contents of FIR was of the opinion that certain provisions of I P C other than those mentioned in FIR were prima facie attracted and passed an order directing for preparation of jail warrant for detention of applicant under S 307 I P C the order could not be said to be illegal and interference with the investigation The Magistrate is well within his rights to differ from the police and can direct for the detention of the accused under relevant section of the statute Order is not vitiated by any provisions of the Code, rather it falls within the ambit of the powers of the Magistrate, exercisable at the stage of remand under S 167 (Paras 6 and 7)

If the Magistrate decides to remand the accused to judicial custody a warrant is prepared and signed by him requiring the Superintendent Jail to detain that person in jail for a period to be clearly specified therein Undoubtedly, the person is detained for committing some offence punishable under some statute The Magistrate has, therefore to mention in his order the relevant section which stands attracted He is, within his rights to go through the contents of the report of the occurrence and form an opinion in regard to the section under which the accused is to be detained in jail and he is legally empowered to direct the preparation of the warrant accordingly The Magistrate is not bound by the opinion of the Investigating Officer in regard to the applicability of the section under which the alleged offence falls True while doing so a Magistrate has not to make a sort of salvaging operation for arriving at a conclusion as to which section of the statute stands attracted but he can undoubtedly prima facie, look into the contents of the first information report and disagree with the opinion formed by the police about the penal provision which covers the case (Para 6)

I Murtaza for Petitioner

ORDER — On the fact of a written report made at police station Mohammadi district Lakhimpur-Kheri, on 6-10-1988 by Sri Satish Kumar Bajpai against Sri Harihar Chaitanya (applicant) and one Devesh Kumar Trivedi a crime was registered under Ss 336 and 506 of the Penal Code The applicant was arrested and produced on 7-10-1989 before the Judicial Magistrate having jurisdiction to try the case The Investigating Officer prayed for detention of the applicant for a period of 14 days in judicial custody The Magistrate perused the contents of the First-Information-Report and formed an opinion that provisions of S 307 of the Indian Penal Code were, prima facie, attracted Therefore, by the impugned order dated 7-10-1988, be directed for the preparation of jail warrant for detention of the applicant under S 307 of the Indian Penal Code

2 This petition under S 482 of the Code of Criminal Procedure (in short, Code) has been filed for quashing the said order

3 I have heard the learned counsel for the parties and have carefully considered the points canvassed before me From the facts given above, it is clear that while exercising powers under S 167 of the Code, the Magistrate disagreed with the opinion formed by the Investigating Officer in regard to the applicability of the penal section to the facts disclosed in the complaint Thus the short question that emerges for determination is as to whether or not the Magistrate possesses such powers The learned counsel for the applicant contended that because it amounts to shifting the proceedings in investigation, the Magistrate had no jurisdiction to pass the impugned order

4 It is well known that the functions of the judiciary and the police are complementary and not overlapping This is also indubitable that investigation of a cognizable offence is the field exclusively reserved for executive through the police department the superintendence of which vests in the State Government and, therefore it should not be interfered with by the judiciary An order for closing or dropping the investigation cannot be passed by the Magistrate as it will amount to causing interference with the statutory powers conferred on the police Further, this is also not open to doubt or suspicion that even at investigation stage the Magistrate has to perform certain functions and pass judicial orders e g grant of bail, detention in judicial or police custody, release of property seized by the police Such orders can be safely characterised as judicial orders passed at the investigation stage and it cannot be said by any stretch of reasoning that such orders cause interference with the investigation by the judiciary

5 In this legal background let us consider the nature of the impugned order passed by the Magistrate, obviously under S 167 of the Code which provides for the procedure to be adopted by the police, if investigation cannot be completed in twenty-four hours The police produces the accused in custody and also relevant papers before the Magistrate and prayed for the detention of the accused in judicial or police custody The Magistrate looks into the material placed before him and is expected to apply his mind before passing an order at that stage Thus although the matter is at initial stage of the investigation, the Magistrate while passing order under S 167 of the Code performs judicial functions

6 Now, if the Magistrate decides to remand the accused to judicial custody, a warrant is prepared and signed by him requiring the Superintendent Jail to detain that person in jail for a period to be clearly specified therein Undoubtedly, the person is

detained for committing some offence punishable under some statute The Magistrate has, therefore to mention in his order the relevant section which stands attracted He is, in my opinion within his rights to go through the contents of the report of the occurrence and form an opinion in regard to the section under which the accused is to be detained in jail and he is legally empowered to direct the preparation of the warrant accordingly The Magistrate is not bound by the opinion of the Investigating Officer in regard to the applicability of the section under which the alleged offence falls True, while doing so, a Magistrate has not to make a sort of salvaging operation for arriving at a conclusion as to which section of the statute stands attracted but he can undoubtedly, prima facie look into the contents of the first information report and disagree with the opinion formed by the police about the penal provision which covers the case The matter can be elucidated by examples

(i) The contents of a report, prima facie make out a case of simple theft but the Investigating Officer writes, the offence, falls under S 395 of the Indian Penal Code

(ii) The recitals of report and the medical report do not disclose the user of any dangerous weapon for causing grevious hurt, yet the police registers it as a crime under S 326 of the Indian Penal Code Such examples can be multiplied The Magistrate is, in my opinion, well within his rights to differ from the police and can direct for the detention of the accused under relevant section of the Statute The instant case falls in this category and it is idle to contend that the orders of this nature cause interference with the investigation

7 For these reasons, I am of the opinion that the impugned order is not vitiated by any provision of the Code, rather it falls within the ambit of the powers of the Magistrate, exercisable at the stage of remand under S 167 of the Code The petition lacks merit and is, therefore, dismissed There is no order as to costs Inform the Court below

Petition dismissed

1991 ALL L J 564

= 1990 Cri L J 2091

(SUPREME COURT)

KULDIP SINGH P B SAWANT AND M FATHIMA BEEVI JJ

Criminal Appeal No 141 of 1979 D/- 19-7-1990

Baital Singh and another Appellants v State of U P, Respondent

(A) Penal Code (45 of 1860), S 300 — Benefit of doubt — Accused not assigned any role by any of eye witnesses in their statements under S 161, Criminal P C — Suspicion so far as presence of accused was concerned — Accused acquitted giving benefit of doubt

Judgment of Allahabad High Court, Reversed

Murder — Appreciation of evidence — Benefit of doubt

Where the accused charged for murder was not assigned any role by the eye-witnesses in their statements under S 161 Criminal P C however, at the time of trial the eye-witnesses deposed that the accused gave injuries by a lathi, there would be suspicion so far as the presence of that accused was concerned, and he would be entitled to be acquitted on benefit of doubt It was more so when he was 60 years of age at the time of occurrence which took place in the year 1974 and it is common tendency in the faction-ridden villager to rope-in all the members of the adversary family

Judgment of Allahabad High Court Reversed (Para 2)

(B) Penal Code (45 of 1860), Ss 302, 149, 34 — Charge under S 302 read with S 149 — Facts showing that accused could have alternatively charged under S 302 r w S 34 — One of accused acquitted — Conviction of others under S 302 read with S 149 could be substituted by S 302 r w S 34

HH/IH/S324/90/JJS

Where there was no charge under S 302 read with S 34 of the Penal Code but the facts of the case were such that the accused could have been charged alternatively either under S 302 read with S 149 or under S 302 read with S 34 and one of the accused was acquitted the conviction under S 302 r w S 149 could be substituted by S 302 r w S 34 keeping in view the facts of the case Moreover according to the prosecution story all the accused came out of the house and attacked the victim two of the accused were armed with spears whereas others were armed with lathis and in the circumstances of the case no prejudice was likely to be caused to the accused whose appeal was being dismissed 1952 Cri LJ 863 (SC) and 1954 Cri LJ 580 (SC) Foll (Para 3)

Cases Referred Chronological			Paras
1954 Cri LJ 580	1954 SCR 904	AIR 1954 SC 204 (Foll)	3
1952 Cri LJ 863	1952 SCR 839	AIR 1952 SC 167 (Foll)	3

JUDGMENT — Baital Singh, Bhagwan Singh and Jangjit Singh are real brothers, Ram Gopal Ram Charan and Sheo Charan are the sons of Baital Singh Om Praksh is the son of Bhagwan Singh Sri Lal deceased was the son of Jangjit Singh Baital Singh was not having good relations with his brothers Bhagwan Singh and Jangjit Singh

2 Baital Singh. his three sons Ram Gopal, Ram Charan and Sheo Charan along with Bidha and Shankar were tried for the murder of Sri Lal son of Jangjit Singh They were acquitted by the Trial Court On appeal by the State of U P the High Court reversed the judgment of the Trial Court and convicted Baital Singh Ram Gopal, Ram Charan, Sheo Charan and Shanker under S 302 read with S 149, IPC and were sentenced to life imprisonment They were also convicted under S 324 read with S 149 IPC and S 148 IPC The acquittal of Bidha by the Trial Court was upheld by the High Court We have been informed that Ram Charan and Sheo Charan died during the pendency of the appeal before the High Court This appeal has been filed by Baital Singh and his son Ram Gopal

2A We have heard learned counsel for the parties We have been taken through the judgment of the Trial Court as well as of the High Court We have also been taken through the statements of witnesses and other record We are in agreement with the appreciation of evidence by the High Court and are not inclined to interfere with the findings reached by the High Court except so far as these relate to Baital Singh-appellant It is admitted position that no role was assigned to Baital Singh by any of the eye-witnesses in their statements under S 161, Criminal Procedure Code whereas at the trial the eye-witnesses deposed that Baital Singh gave injuries by a lathi Baital Singh was 60 years of age at the time of occurrence which took place in the year 1972 We have a lurking suspicion in our mind so far as the presence of Baital Singh is concerned It is common tendency in the faction-ridden villages to rope-in all the members of the adversary family Keeping in view these circumstances we give benefit of doubt to Baital Singh and set aside his conviction and sentence

3 As a result of acquittal of Baital Singh we alter the conviction of the remaining accused from S 302 read with S 149 to S 302 read with S 34 of the IPC It is true that there was no charge under S 302 read with S 34 of the Indian Penal Code but the facts of the case are such that the accused could have been charged alternatively either under S 302 read with S 149 or under S 302 read with S 34 In this case according to the prosecution story all the accused came out of the house of Baital Singh and attacked Sri Lal Ram Gopal and Ram Charan were armed with spears whereas Bidha, Baital Singh and Sheo Charan were armed with lathis In the circumstances of the case no prejudice is likely to be caused to the accused whose appeal is being dismissed This Court in Lachman Singh v The State, 1952 SCR 839 (1952 Cri LJ 863) and Karnail Singh v State of Punjab 1954 SCR 904 (1954 Cri LJ 580) has held that the conviction under S 149 can be substituted by S 34 keeping in view the facts of the case

4 We, therefore, accept the appeal so far as Baital Singh is concerned and dismiss the appeal in respect of Ram Gopal We, how-

ever, alter the conviction of Ram Gopal to S 302 read with S 34 and maintain the sentence of life imprisonment awarded to him The bail-bond of Ram Gopal is cancelled and he is directed to surrender forthwith to undergo the balance of the sentence

Order accordingly

1991 ALL L J 566

= 1990 Cri L J 2519

(LUCKNOW BENCH)

S S AHMAD AND S N SAHAY, JJ

Ram Shankar and others Petitioners v The State Respondent

Writ Petn No 10514 of 1989, D/- 14-12-1989

Criminal P C (2 of 1974), Ss 439(2), 444(3), and Sch II, Form 25 — Bail — Application for cancellation of — Court cannot direct that for committing to custody person released on bail, bail is suspended and only personal bond executed by accused is cancelled and surety bond is not cancelled

Bail — Cancellation — Direction suspending bail cancelling only personal bond of accused and not surety bond, illegal

An application for cancellation of bail is made to a Court of Session under Section 439(2) and to any other Court under Section 437(5), Cr P C When the Court is satisfied that there are good grounds for cancelling the bail, it has to pass a judicial order in terms of the aforesaid sections that the person who has been released on bail be arrested and committed to custody A person may be released on executing personal bond only, but if he is released on bail then he must, as required by Section 441(1), Cr P C, execute a personal bond as well as furnish surety bonds It follows that on cancellation of bail and on being arrested and committed to custody, a direction must be given for discharging both the personal bond and the surety bond It is legally not possible to cancel one of the two and keep the other alive and operative This view is inforced by the provisions of Section 444(3) and Schedule II Form 45 which show that the surety bond discharged on the appearance of the accused pursuant to a warrant of arrest issued against him or on his voluntary surrender (Para 4)

The provisions of Schedule II Form 25, Cr P C show that personal bond is given by the accused for attending the Court on every day on which trial is held and surety bond is given for the purpose that the accused shall attend the Court on every day on which the trial is held and in case of default the accused binds himself and the sureties bind themselves to forfeit to the Government certain sum of money All or any of the sureties may apply under Section 444 to discharge the bond and on such application being made warrant of arrest shall be issued against the accused and on the appearance of the accused pursuant to the warrant or on his voluntary surrender the surety bond shall be discharged When the accused for whose appearance the surety bond has been given, is taken into custody the surety bond stands discharged Therefore it will not be in accordance with law to direct for the purpose of committing to custody a person who has been released on bail that the bail is suspended and only the personal bond executed by him is cancelled and the surety bond furnished by him is not cancelled (Para 5)

S N SAHAY, J — This petition is directed against the order dated October 27, 1989 passed by Sri P S Chhabra, I Additional Sessions Judge, Sitapur, cancelling the personal bonds of the petitioners Ram Shankar, Rajaram and Nanhe Singh

2 We have heard the learned Counsel for the petitioners and the learned Government Advocate for the State Opposite Party, and with their consent proceed to dispose of the petition finally

3 The petitioners along with Narendra Prakash are facing trial in the Court of I Additional Sessions Judge, Sitapur in a case under Sections 147/148/149 and 302, I P C The petitioners were on bail which was granted by this Court An application was moved

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FB/GH/A430/90/SVD

for the cancellation of bail on various grounds and one of the grounds was that the petitioners had threatened or were threatening the complainant as well as other witnesses This application was heard by the learned I Additional Sessions Judge and was rejected in respect of Sheo Naresh accused As regards others the following order was passed by him —

In these circumstances I am of the view that the bail should not be cancelled but it should be suspended for the period till the cross-examination of all the witnesses of fact is completed with the direction that the prosecution shall produce the witnesses of fact before examining any formal witnesses Till the cross-examination of the witnesses of fact is not over, the personal bonds of the accused persons shall remain cancelled except personal bond of Sheo Naresh Therefore, I order for cancellation of personal bonds of accused Rajaram Ram Shankar Nanhe and Narendra Prakash Accused Narendre Prakash is in jail and the remaining three accused persons Rajaram Ram Shankar and Nanhe Singh be taken into custody forthwith It may be made clear that if the prosecution takes unnecessary adjournments in producing the witnesses of fact then the accused will be at liberty to file fresh personal bonds and will be entitled for release on moving an application

4 An application for cancellation of bail is made to a Court of Sessions under Section 439(2) and to any other court under S 437(5). Cr P C When the Court is satisfied that there are good grounds for cancelling the bail it has to pass judicial order in terms of the aforesaid sections that the person who has been released on bail be arrested and committed to custody A person may be released on executing personal bond only but if he is released on bail then he must as required by Section 441(1) Cr P C execute a personal bond as well as furnish surety bonds It follows that on cancellation of bail and on being arrested and committed to custody, a direction must be given for discharging both the personal bond and the surety bond It is legally not possible to cancel one of the two and keep the other alive and operative This view is reinforced by the provisions of Section 443(3) and Schedule II, Form 45 which show that the surety bond is discharged on the appearace of the accused pursuant to a warrant of arrest issued against him or on his voluntary surrender

5 The provisions of Schedule II, Form 25 Cr P C show that personal bond is given by the accused for attending the Court on every day on which trial is held and surety bond is given for the purpose that the accused shall attend the Court on every day on which the trial is held and in case of default the accused binds himself and the sureties bind themselves to forfeit to the Government certain sum of money All or any of the sureties may apply under Section 444 to discharge the bond and on such application being made, warrant of arrest shall be issued against the accused and on the appearance of the accused pursuant to the warrant or on his voluntary surrender the surety bond shall be discharged When the accused for whose appearance the surety bond has been given, is taken into custody, the surety bond stands discharged Therefore it will not be in accordance with law to direct for the purpose of committing to custody a person who has been released on bail that the bail is suspended and only the personal bond executed by him is cancelled and the surety bond furnished is not cancelled

6 Learned Government Advocate has contended that the surety bonds in the instant case were impliedly discharged when the impugned order was passed for committing the petitioners to custody This contention cannot be accepted in view of the impugned order expressly providing that the bail should not be cancelled and it should be suspended and the personal bonds are cancelled and if the prosecution takes unnecessary adjournments in producing the witnesses of fact then the accused will be at liberty to file fresh personal bonds and will be entitled for release on moving an application The impugned order is not in accordance with the provisions of S 439(2) read with S 441, Cr P C and is liable to be set aside

7 For the above reasons we allow the petition and quash the impugned order contained in annexure I, to the writ petition We direct that the petitioners shall be released on the personal bonds already furnished by them unless they are liable otherwise to be detained in the present case or any other case according to law We further direct that the application or cancellation of the bail shall be dealt with and disposed of by the learned I Additional Sessions Judge, Sitapur according to law

Petition allowed

1991 ALL L J 568

= 1990 CRI L J 2524

K K BIRLA, J

Bechan, Applicant v State of U P , Opposite Party

Criminal Misc Bail Appln No 6647 of 1990, D/- 13-6-1990

Juvenile Justice Act (1986), S 18 — Criminal P C (2 of 1974), S 439 — Application for bail — Rape case — Accused not apparently a juvenile — Medical evidence showing his age about 18 years — Not entitled to bail

Penal Code (1860), S 375

Evidence Act (1872), S 45

1982 Cri LJ 1777 (SC), Distinguished

(Paras 1, 2)

Cases Referred Chronological	**Paras**
1982 Cri LJ 1777 AIR 1982 SC 1297 (Distinguished)	1

H N Singh, for Applicant A G A , for Opposite Party

ORDER — The petitioner is accused of committing rape of the Girl of about 9 or 10 years The contention on behalf of the petitioner is that the accused was less than 16 years of age regarding which he had filed the extract of the Kutumb register before the lower Court In the order of the Additional Sessions Judge, Mirzapur there is a mention that the Chief Medical Officer Mirzapur had reported the age of the applicant as 18 years It is contended on behalf of the applicant that one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side Reliance is placed for this proposition on the case of Jaya Mala v Home Secretary Govt of Jammu and Kashmir reported in AIR 1982 SC 1297 (1982 Cri LJ 1777) It is further contended that u/S 18 of the Juvenile Justice Act 1986, hereinafter referred to as the 'Act' if any person accused of bailable or non-bailable offence and apparently a juvenile is arrested, he shall be released on bail It is contended that on being given the margin of error in the age of two years as reported by the Chief Medical Officer, Mirzapur the petitioner becomes entitled to bail u/S 18 of the Act U/S 2(h) of the Act juvenile means a boy who has not attained the age of sixteen years or a girl who had not attained the age of eighteen years The medical evidence gives the age of the accused as 18 years The principles laid down in the case of Jaya Mala (supra) will be of no help to the petitioner so as to give him any benefit u/S 18 of the Act, U/S 18(1) of the Act a person shall be entitled to bail only when such arrested person is apparently juvenile According to the Chambers Twentieth Century Dictionary Edition 1983, the word "apparent means obvious conspicuous Therefore in order to get the benefit of S 18(1) of the Act the petitioner should have been obviously or conspicuously a juvenile, that is, under 16 years of age As pointed above in the medical evidence he is about 18 years old, therefore, he cannot be said to be apparently a juvenile and therefore S 18 is of no avail to the petitioner in my opinion Copy of Kutumb register or the report of the Chief Medical Officer has also not been produced in the Court

2 Considering the nature of the offence I am of the view that it is not a fit case for grant of bail The observations made above are simply for the purposes of this application The application is accordingly, rejected

Application dismissed

HH/JH/A517/90/VAP/VVG

1991 ALL L J 569

= 1990 CRI L J 2525

PALOK BASU, J

Dharmvir and others, Petitioners v State of U P and others, Respondents

Civil Misc Writ Petn No 16512 of 1989 D/- 7-12-1989

Criminal P C (1974), S 202(2), Proviso — Penal Code (1860),S 307 — Order summoning the accused u/S 307, Penal Code — In the statement before Magistrate, doctor not stating that any of injuries sustained were likely to cause death or were in the normal case suspected to cause that harm — Order illegal and liable to be quashed

It goes without saying that in case where the prosecution examines a medical expert to prove that the intention of the accused as revealed by the injuries examined by him travelled up to the stage of making the offence punishable u/S 307 IPC such evidence must come forthwith as to make out the said case even prima facie Where the Doctor has not said in the statement before the Magistrate that any of the injuries sustained were likely to cause death or were in the normal case suspected to cause that harm the benefit of this statement must go to the accused because the summoning order itself may make a lot of difference as to the forum of trial, and the Magistrate order summoning the accused u/S 307 being illegal should be quashed (Paras 9, 10)

There is a wisdom behind enacting the proviso to sub-s (2) of S 202, Cr P C In a police case normally an investigation reveals the nature of the alleged crime and, therefore, when after collecting the materials a charge-sheet in a case exclusively triable by the Court of Sessions comes before the Magisterial Court he has not to refer to anything further and commit the case to the Court of Sessions u/S 209, Cr P C But in complaint cases the Magistrate has been by the said proviso called upon to examine all the complainant s witnesses This appears to have been done with the purpose that the accused may not be harassed by false and frivolous complaints The duty of the Magistrates in complaints about offences triable by the Sessions Judges becomes onerous The legislative intent behind the said proviso must be carried to its logical end (Para 6)

ORDER — This writ petition has been filed by Dharmvir and 6 others against an order of the Magistrate concerned summoning them u/Ss 147/148/149/323/307 IPC, which order has been upheld in revision by the Sessions Judge Saharanpur on 14-9-1989 The brief facts are that a complaint was filed by Ram Swaroop under the aforesaid Sections alleging that the incident took place on 1-7-1988 around 2-30 p m when the accused petitioner had come variously armed and assaulted the prosecution side causing them serious injuries Since the matter was reported to the police and it did not take suitable action the Magistrate was approached by means of criminal complaint Being prima facie satisfied that since the complaint allegations were making out a case u/S 307, IPC also the Magistrate perhaps thought it best to direct the complainant to examine all his witnesses The complainant consequently examined Naresh Ram Baran Ved Pal Hukum Singh Jai Singh and Dr Lok Nath Deepak as prosecution witnesses number one to number six respectively On a perusal of the material thus produced by the complainant the Magistrate had proceeded to pass the impugned order summoning the accused

2 Sri Chandra Shekhar Sharma learned Counsel for the petitioner has raised two points for consideration

3 Firstly that other witnesses namely Tufail Maqsood Baburam Idris Yaseen and Dharmvir though mentioned by the complainant as witnesses of the occurrence have not been examined u/S 202 Cr P C

4 Secondly the statement of the doctor namely P W 6 Doctor Lok Nath Deepak does not indicate that any injury sustained by the prosecution side could be sufficient in the ordinary course of nature to cause death The argument therefore, proceeds that the summoning order u/S 307, IPC would be illegal

BH/CH/A65/90/AAJ

5 Sri Ashok Mehta learned Counsel for the complainant has brought to the notice of this Court that the complainant Ram Swaroop had moved application before the Magistrate showing that those witnesses (named above) have been won over by the accused's side and presently were not prepared to speak the truth and, therefore, he was willing to give them up and they may be examined during trial This application was allowed by the Magistrate It was further argued by him that the statement of Dr Lok Nath Deepak that he found grievous injuries on vital parts of some of the victims has tentatively made the order of the Magistrate summoning the accused u/S 307 IPC valid and legal Sri R P Tripathi learned Additional Public Prosecutor appearing on behalf of the State of U P has supported the argument of Mr Mehta

6 There is a wisdom behind enacting the proviso to sub-s (2) of S 202, Cr P C In a police case normally an investigation reveals the nature of the alleged crime and therefore when after collecting the materials, a charge-sheet in a case exclusively triable by the Court of Sessions comes before the Magisterial Court, he has not to refer to anything further and commit the case to the Court of Sessions u/S 209, Cr P C But in complaint cases the Magistrate has been, by the said proviso, called upon to examine all the complainant's witnesses This appears to have been done with the purpose that the accused may not be harassed by false and frivolous complaints The duty of the Magistrates in complaints about offences triable by the Sessions Judges becomes onerous The legislative intent behind the said proviso must be carried to its logical end

7 In the present case since the doctor has been examined it has to be seen as to what transpires from his statement If, according to his opinion the injuries sustained bring the case within the four corners of S 307, IPC, it will be legitimate to pass an order for summoning and then for commitment, but if from the statement such an opinion is prima facie not possible, then the order in so far as it relates to summoning the accused u/S 307, IPC would be illegal

8 It is admitted case that according to the statement of doctor Lok Nath Deepak a true copy of whose statement has been filed as Annexure 3 to this writ petition he medically examined Ved Pal Singh Ram Swaroop Hukum Singh Tufail and Idris and that he had directed X-Ray examination to be done concerning the injuries of Ved Pal and Idris His opinion however is that the injuries of Ved Pal Ram Swaroop and Hukum Singh were on vital parts Nowhere in the statement it is to be found that those injuries could have been likely to cause death in the normal circumstances

9 It goes without saying that in cases where the prosecution examines a medical expert to prove that the intention of the accused as revealed by the injuries examined by him travelled up to the stage of making the offence punishable u/S 307 IPC such evidence must come forthwith as to make out the said case even prima facie As noted above Doctor Lok Nath Deepak has not said in the statement before the Magistrate that any of the injuries sustained were likely to cause death or were in the normal case suspected to cause that harm The benefit of this statement must go to the accused because the summoning order itself may make a lot of difference as to the forum of trial

10 Under these circumstances this writ petition is partly allowed The Magistrate's order dated 26-5-1989 is quashed in so far as he has summoned the accused/petitioner u/S 307, IPC but it is upheld in so far as it relates to Ss 147/148/149/323/324 IPC

11 It is hereby directed that in case petitioners Dharmvir Bhanwar Singh, Mahavir Harvir Baljor, Ratan and Jairam are arrested and brought before the competent Court or surrender before it and make an application for bail, it will be decided in accordance with law on the day it is moved, unless prevented by unforeseen circumstances

12 Notwithstanding anything stated above, it will be open to the Magistrate to frame add or alter the charges concerning the accused petitioners, if and when from the

evidence it transpires that apart from Ss 147/148/149/324 IPC any other offence is made out In that event, he will proceed to try or commit the accused in accordance with law

13 A certified copy of this order may be furnished to the learned Counsel for the parties on payment of usual charges within a week from today Warrant of arrest if any shall not be executed for 15 days from today, unless the accused voluntarily surrenders to the said warrant before the Court concerned

Petition partly allowed

1991 ALL L J 571

P S GUPTA AND U K VERMA, JJ

Deepak Kumar Garg, Appellant (in jail) v State of U P Respondent

Criminal Appeal No 2119 of 1984, D/- 21-10-1989

Evidence Act (1872), S 32 — Dying declaration — Validity — Declaration not given in presence of doctors or Magistrate — Testimony of witness before whom alleged declaration is said to be given, not found trustworthy — Conviction could not be based on such infirm declaration

Penal Code (1860), S 302 (Para 23)

Cases Referred Chronological	Paras
1985 Cri LJ 336 (Andh Pra)	21
AIR 1978 SC 519 1978 Cri LJ 644	18
(1977) 1 SCC 762 (1976) 2 SCWR 390	18
1977 Cri LJ 1626 (All)	21
AIR 1976 SC 1782 1976 Cri LJ 1382	21

Tapan Ghosh and S S Tewari, for Appellant Dy Govt Advocate, for Respondent

U K VERMA, J — This is an appeal against the judgment of Sri N B Asthana Ist Additional Sessions Judge, Meerut dated July 31, 1904 convicting the appellant Deepak Kumar under S 302 read with S 34 of the Indian Penal Code and sentencing him to undergo imprisonment for life

2 The uncontroverted facts are that at about 6 20 p m on 22-6-1981 Praveen Kumar alias Pappi and Rajiv saw Kishore Kumar lying injured in front of Praveen s house Both Praveen and Rajiv went to the clinic of Dr Narendra Nath Sharma situate in Gandhi Nagar to bring him for his treatment Dr Narendra Nath Sharma respondent to their request He found Kishore Kumar to be in need of a surgeon s attention immediately Ajai Kumar who had also arrived there by his car took Kishore Kumar to the Emergency Ward of the Medical College, Meerut along with Dr Narendra Nath Sharma and Praveen Kumar The Surgeon on call duty at that time was Dr Sudhir Kumar Bhargava and so Dr Narendra Nath Sharma rushed by Ajai s car to his house to bring him Dr Sudhir Kumar Bhargava could not be contacted as he was not at his house then Dr Narendra Nath Sharma returned to the Emergency Ward of the Medical College and after finding out the location of the house of Kishore Kumar went to inform his relatives about him He met Anil Kumar Pokharyal, the elder brother of the injured and told him about his serious condition Dr Narendra Nath Sharma brought Anil Kumar Pokharyal in the car up to the gate of the Medical College He dropped him there and proceeded to the house of Dr Bhargava The wife of Dr Bhargava told Dr Sharma that he could be at the Nursing Home of Dr Rajpal or at his own clinic Dr Narendra Nath Sharma from the house of Dr Bhargava came to the Emergency Ward of the Medical College He took Anil Kumar Pokharyal along with him to the clinic of Dr Bhargava On being informed of the condition of Kishore Kumar Dr Bhargava went to the Emergency Ward of the Medical College on his scooter Anil Kumar Pokharyal dropped Dr Narendra Nath Sharma at his clinic by the car and himself went to the Medical College

3 Dr D D Agarwal, PW 12 before the arrival of Dr Sudhir Kumar Bhargava, had examined Kishore Kumar at 7 10 p m and found the following injury on his person

Incised punctured wound 3 5 cm x 2 5 cm x abdomen 3 cm above umblicus bleeding oementum coming out

The doctor in his report Ex Ka 1 made a note that the depth could not be probed. The injury had been caused by sharp object. Its duration was fresh and the case was being referred to the Surgeon.

4 The general condition of Kishore Kumar and also the treatment given to him from the time of his admission till his death at 1.05 a.m. on 23-6-1981 are contained in the Patient Chart extracts of which are Ex Ka 6 and Ex Ka-2. Dr Bhargava PW 9 pointed that he had dictated the details of the operation Ex Ka 6 to Dr K K Singh, Registrar immediately after the operation. It follows therefrom that two litres of clotted blood had been removed from haemopeutoneum. He found two perforations in the anterior and the posterior walls of his stomach, one perforation in the anterior wall of the duodenum, one perforation in the gall bladder with bile flowing out of it, laceration in the lever anterior border bleeding, laceration in the lever under surface. Dr Bhargava sucked out the clotted blood, closed the lacerations and perforations and did the peritoneal toilet and also the dressing of all the wounds.

5 The post mortem examinations had been done by Dr Vijai Singh at 4.00 p.m. on 23-6-81 and the relevant portions of the post-mortem report of Dr Vijai Singh PW 5 are as hereunder —

(1) Stitched wound 18 cm long over the abdomen containing 14 stitches. Besides this stitched wound he found 2 other stitched wounds measuring 4 cm and 3 cm in length respectively.

(2) 2 cut open wounds stitched — one on the left wrist and the other on the lower part of the left foot.

Upon internal examinations peritoneum was found stitched at a number of places. one ounce faecal matter and blood was found in the peritoneal cavity. Small intestine was stitched at two places and the large intestine at four places. Two stitches were also found in the lever. According to the doctor, death was caused as a result of shock and haemorrhage which was the result of the injuries upon the dead body.

6 The prosecution case is that at about 6.00 p.m. on 20-6-81 Kishore Kumar and the appellant had quarrelled by the side of the road in front of the Nandan Cinema Hall. Kishore Kumar slapped Deepak Kumar. The prosecution witnesses Rajneesh PW 2 and Jagdish Prasad PW 3 pacified them. Deepak however threatened Kishore Kumar that within four days he would be done to death. Kishore Kumar with the injury dealt with above in Ex Ka 6 on his person was taken to the Emergency Ward of the Lala Lajpat Rai Medical College, Meerut. In the F I R Ex Ka 3 under Section 307 I P C shown to have been lodged by Anil Kumar Pokharyal PW 6 at 6.58 p.m. on 22-6-81 however the above incident leading to the crime is not mentioned. It is only pointed therein that on being informed by Dr Narendra Nath Sharma that he and Ajit had taken Kishore Kumar in a car from Gandhi Nagar to the Medical College with serious knife injury he and his brother reached the Medical College at 6.30 p.m. Kishore Kumar was crying in agony 'Save me. Deepak alias Dabbu of Hanumanpuri Meerut assaulted me with knife in front of the house of Pappi. At the time of assault he was accompanied with two or three persons. After inflicting the wound, he fled away.' This incident took place at 6.20 p.m. Many persons of the locality witnessed it. Dr Bhargava had been informed about the condition of Kishore Kumar. He was undergoing treatment in the Medical College, Meerut with his brother Sunil Kumar attending him at the time of the report.

7 The check report Ex Ka-3 and the G B entry by which the case was registered against the appellant under S. 307 I P C marked Ex Ka-4 were proved by the Constable Clerk Gajendra Singh PW 8, the maker thereof. He also stated that the G D entry No. 25 of 24-6-1981 marked Ex Ka-65 by which this case was converted into one under Section 302 I P C had been made by Jagdeo Singh S I.

8 The investigation of the case was conducted by Jai Deo Singh, Sub-Inspector. He deposed that this case was registered in his presence. He took up the investigation. On

reaching the Medical College he found that the injured was not in a position to speak and his condition was not good He recorded the statements of Anil Kumar Pokharyal PW 6 and Sunil Kumar (not examined) He thereafter came to the scene of occurrence in Mohalla Gandhi Nagar On not finding any one nearby, he instructed the constable on patrol duty to guard the place of the incident On 23-6-1981 he recorded the statement of Praveen Kumar alias Pappi and with his help prepared the site plan Ex Ka-12 He took the plain and blood stained earth and prepared the recorvery memo Ex Ka-13 He thereafter recorded the statements of Subhash Narendra Pal and Surendra Kumar who had arrived there He searched for Deepak Kumar appellant but he did not find him On 25-6-1981 he recorded the statement of Ajai Kumar and without any success again tried to find out the appellant On 28-6-81 he handed over the investigation to the Inspector S P Govil On 15-7-1981, he again took up the investigation when Govil was transferred and recorded the statement of S I Naresh Chaudhary PW 10 On 17-7-1981, he examined the appellant who had earlier surrendered in the court on 8-7-1981 On 22-7-1981, he recorded the statements of the witnesses of motive named Rajneesh PW 2 and Jagdish PW 3 and the Head Constable Kripal Singh and Ratan Kumar On 25-7-1981 he examined Dr Narendra Nath Sharma On 3-8-1981, he received the inquest and the autopsy reports and examined Anil Kumar son of Sita Ram PW 7 and further examined S I Naresh Chaudhari and submitted the charge-sheet Ex Ka-14

9 The prosecution examined Rajneesh PW 2 and Jagdish Prasad PW 3 to prove the motive but they denied that they were witnesses to any quarrel which had earlier taken place between the deceased and the appellant on 20-6-1981 They also did not affirm that the appellant had given any threat to take the life of Kishore Kumar The witness Rajneesh stated that the father of Kishore Kumar was his tenant

10 Praveen Kumar alias Pappi PW 4 narrated that when he saw Kishore Kumar lying injured in front of his house between 6 00 and 6 30 p m he went to call Dr Narendra Nath Sharma after informing his neighbour Ajai Kumar about it He returned along with Dr Narendra Nath Sharma Ajai Kumar before their arrival had already put Kishore Kumar inside the car in a lying posture They took Kishore Kumar in the Emergency Ward of the Medical College and got him admitted there He denied that Kishore Kumar had made statement that he was assaulted by Deepak alias Dabbu of Hanumanpuri who also owned a dairy in Mohanpuri and that he and his associates managed to make good their escape In the cross-examination for the accused he pointed that the witness Anil son of Sitaram PW 7 and the brother of Kishore Kumar named Sunil or any Sub-Inspector had not reached the hospital in his presence He only stated Anil Kumar Pokharyal PW 6 to have arrived in the Emergency Ward while he was there

11 Dr Narendra Nath Sharma PW 1 who had accompanied Kishore Kumar from the place of incident to the Medical College in the car of Ajai Kumar PW 1 along with Praveen Kumar alias Pappi PW 4 narrated as to how he had gone to examine an injured when Pappi and Rajiv told him that he was not in such a condition that he could be brought to his clinic and after reaching the Emergency Ward of the Medical College proceeded in search of Dr Sudhir Kumar Bhargava in the car of Ajai at a time when Ajai and Pappi were getting Kishore Kumar admitted the hospital, how on not meeting Dr Bhargava in the first attempt he reached the house of the injured whose address had been given by Pappi and informed Anil Kumar Pokharyal PW 6 about the serious condition of his brother and brought him in Ajai s car up to the gate of the Medical College and went to the house of Dr Bhargava who could not be contacted in the second attempt also, how he again came to the Emergency Ward, picked up Anil Kumar Pokharyal PW 6 and went along with him to Dr Bhargava s clinic to inform him about the urgency of the matter Dr Narendra Nath Sharma did not state that Anil Kumar Pokharyal had made any enquiry from

Kishore Kumar about his assailant or that Kishore Kumar himself without being asked had been accusing any one for the injury which ultimately resulted in his death Dr Narendra Nath Sharma however as follows from his statement, had been present in the Emergency Ward when Anil Kumar Pokharyal was also there by the side of Kishore Kumar except for the brief period when he had gone alone to Dr Bhargava's residence and returned back with the information that by then he would have reached Rajpal Nursing Home or his clinic This witness had not been cross-examined by the appellant Only this information was elicited from him that the house of Dr Bhargava was on the campus of the Medical College itself

12 It could not be investigated as to who witnessed the assault on Kishore Kumar The prosecution relies on the testimony of Anil Kumar Pokharyal PW 6, Sunil Kumar son of Sita Ram PW 7 and S I Naresh Chaudhari PW 10 who have deposed about the dying declaration of Kishore Kumar coupled with the circumstances that the informant had no motive to falsely accuse the appellant in the F I R lodged promptly to substantiate the guilt of the appellant

13 Anil Kumar Pokharyal PW 6 stated that on learning from Dr Narendra Nath Sharma that his brother Kishore Kumar was admitted in the Emergency Ward of the Medical College in a wounded state, he accompanied Dr Narendra Nath Sharma to the Medical College and told his brother Sunil Kumar that they might also come Sunil Kumar and his friend Anil Kumar son of Sita Ram PW 7 reached the Emergency Ward of the Medical College after him Kishore Kumar who was lying on a stretcher there, was crying in agony that he be saved When he enquired as to who had assaulted him with knife, Kishore Kumar told him that Deepak Kumar alias Dabbu of Hanumanpuri had inflicted the knife injury in front of Praveen Kumar's house in Gandhi Nagar at about 6 15 p m Anil Kumar Pokharyal at first stated that at the time when the above statement was made by Kishore Kumar, no doctor was present He, however, in the next breath stated that no Surgeon was present then and only Junior Doctors were in attendance The others present were described by him to be some friends of Kishore Kumar and a Sub-Inspector of Police Yet later on he stated that his brother Sunil Kumar and his friend Anil Kumar son of Sita Ram were also present He went to call Dr Bhargava He was contacted at his clinic near the Odeon Cinema House He started for the Medical College on his scooter When he returned Kishore Kumar had already been shifted to the operation theatre Dr Bhargava too reached later After arranging for blood and medicines, he went to the police station Civil Lines where he handed over the written report In the cross-examination he stated that the place of incident was four kilometres from the Medical College and his house therefrom was only three and a half kilometres away He denied to have enquired from Dr Narendra Nath Sharma as to who had assaulted Kishore Kumar He explained that he did not make any inquiry in this regard as he had got nervous He stated that he did not consider it necessary to make a mention in the F I R that his friend Anil Kumar son of Sita Ram PW 7 had also reached the Medical College He was confronted with his statement under S 161, Cr P C which too does not contain any averment that Anil Kumar s/o Sita Ram had also been present at the time when Kishore Kumar made the dying declaration in the Emergency Ward In the last paragraph of his statement he is found to have denied that Kishore Kumar in agony was himself crying that Deepak Kumar had assaulted him The witness was asked to explain as to why in the F I R he had not mentioned that on his inquiry Kishore Kumar had told him the name of his assailant He gave out that he forgot to do so When his attention was invited to the same position in respect of his statement under Section 161, Cr P C he gave out that he had told the Investigating Officer about it, but he did not know as to why the Investigating Officer did not record it The witness expressed his inability to tell the names of the Junior Doctors who were present at the time of the dying declaration In the resumed cross-examination on 22-2-84 Anil Kumar Pokharyal gave out that he and

Dr Narendra Nath Sharma together had been present in the Emergency Ward for five minutes when the Junior Doctors were bandaging the wound of Kishore Kumar where after they both went by car to bring Dr Bhargava In respect of the presence of the Police Sub-Inspector he stated that he was present in the Emergency Ward when he arrived there but he was not there when he left the place to call Dr Bhargava He could not explain as to why he had not alleged about the presence of the Sub-Inspector also in the F I R The Sub-Inspector, he further gave out, was also not present when he brought Dr Bhargava in between 7 15 and 7 30 p m He denied to have asked his brother about the number of persons accompanying the appellant at the time of the assault and also the names of the persons who had seen the incident He at the end of his cross-examination deposed that when his brother had told him that Deepak had assaulted him he could not make out as to who that Deepak could be He, however, in respect of this suggestion of the counsel for the accused in the trial court that there were many Deepaks in Hanumanpuri volunteered that his brother had told him that Deepak alias Dabbu had assaulted him

14 Anil Kumar son of Sitaram P W 7 stated that he and Sunuil Kumar had come on the Vicky Motorcycle to the Medical College after Anil Kumar had reached there with Dr Narendra Nath Sharma Kishore Kumar as given out by him had only told that Deepak of Hanumanpuri had assaulted, but had not mentioned the weapon with which he had done so In the cross-examination he stated that when he reached the Emergency Ward no doctor was attending on Kishore Kumar He could not tell how long Anil Kumar Pokharyal remained with Kishore Kumar as he had gone to call Dr Nagar and to bring the medicines prescribed He gave out the duration of his stay in the Emergency Ward to be two minutes only for the doctor had not delayed in writing the prescription with regard to the medicines to be given to Kishore Kumar He pointed to have reached the Emergency Ward at the time when Anil Kumar Pokharyal was making inquiry from Kishore Kumar about his assailant In the last para of his statement he has given out that he Sunil and Anil Kumar Pokharyal and the Sub-Inspector and one other person whom he did not know were present at the time when Kishore Kumar told the name of his assailant He controverted the statement of Anil Kumar Pokharyal and gave out that he was neither the friend of Anil Kumar not Sunil but was a teacher colleague of their sister

15 S I Naresh Chaudhari P W 10 deposed that he had gone to the Medical College campus in connection with the investigation of a case relating to the theft of a Motorcycle and after recording the statement of Dr Rama Kant Sharma had remained there He had seen Kishore Kumar lying on a bed There were one or two persons by his side He enquired of Kishore Kumar as to who had assaulted him He had told him that Deepak along with two and three associates of his had inflicted the knife injury in his stomach After examining the General Diary entry No 26 of the Medical College police out-post he pointed that he had left Kishore Kumar at 8 45 p m while he was in the Emergency Ward He could not say as to when the doctor had arrived to examine Kishore Kumar and volunteered that he could have come before his arrival He explained that he had not registered the case in his police station as it related to the police station Civil Lines He however, conceded that he had not taken care to inform the police station Civil Lines about the matter he pointed to have prepared the inquest report next day marked Ex Ka-7 and the other papers Ex Ka-8 to Ex Ka-10 for getting the autopsy done

16 The appellant denied to have assaulted Kishore Kumar The police was alleged to have falsely implicated him in this case as they bore ill-will towards his uncle Hari Krishan Garg He admitted that at the time of the incident he resided in Hanumanpuri, but denied that his nick name was Dabbu or that he had any milk dairy in Mohanpuri

17 The appellant had examined Ajai Kumar D W 1 in the trial Court He deposed that he had taken Kishore Kumar to the Emergency Ward of the Medical College along with Pappi and Dr Narendra Nath

Sharma Kishore Kumar was got admitted by him Kishore Kumar had been given injection and medicines He remained there till Kishore Kumar was moved to the operation theater Kishore Kumar did not tell the name of his assailant He was not in such a state wherein anyone was in a position to talk to him or to enquire from him He stated that he was an income-tax assessee and had donated his blood on being told that it would be needed In the cross-examination he pointed that he did not know Deepak appellant Kishore according to him was moved for the operation at about 8 30 p m He expressed his inability to give the names of the doctors who had attended on Kishore Kumar He explained that he remained in the hospital till 9 00 p m so that he was able to provide relief to the patient if needed He had volunteered that he had also got medicines for Kishore Kumar

18 The learned 1st Additional Sessions Judge in his judgment has referred to the case of Vithal Somnath More v State of Maharashtra reported in AIR 1978 SC 519 dealing with the value to be attached to a dying declaration as piece of evidence It has been held therein that the dying declaration does not require to be corroborated to form the sole basis of conviction if its truthfulness is accepted He has also made a mention of the case of Bhayani Luchana Radha Bai v State of Gujarat reported in (1977) 1 SCC 762 in support of this proposition that the dying declaration stands on the same footing as any other piece of evidence and had to be judged in the light of the surrounding circumstances and with reference to the principle as to how evidence is to be weighed and it is no longer good law to treat it as a weaker kind of evidence in comparison to others He has based his order convicting the appellant on the ground that the dying declaration of Kishore Kumar as narrated by Anil Kumar Pokharyal and Sunil seemed to be trust worthy particularly because they had no motive to falsely implicate the appellant The 1st Addl Sessions Judge in his judgment has, however not held S I Naresh Chaudhari P W 10 to be trust worthy for many reasons, chief of which being his inability to state as to when the doctors had attended on Kishore Kumar and his statement against the record of the Medical College and also the other witnesses that Kishore Kumar remained in the Emergency Ward of the Medical College till 8 45 p m when he himself went away Kishore Kumar according to the S I Naresh Chaudhari P W 10 had given his dying declaration after 7 30 p m when he put this question to him as to who had assaulted him He did not state that Anil Kumar Pokharyal had made the above enquiry He could not explain satisfactorily as to what had obtained him there beyond 1 00 p m when he had recorded the statement of Dr Rama Kant Sharma in crime case No 107 He further could not tell the names of the persons who were present at the time when Kishore Kumar had made the dying declaration He did not remember his alleged statement under Section 161 Cr P C that the deceased had told him that the person who had inflicted the knife injury owned dairy in Mohanpura In case his statement would have been accepted the 1st Additional Sessions Judge would have found difficulty in reconciling it with the statements of Anil Kumar Pokharyal P W 6 and Sunil Kumar P W 7 The S I Naresh Chaudhari appears to us also to be a got up witness and his statement about the above dying declaration of Kishore Kumar having been made in his presence was liable to be discarded summarily

19 We shall next proceed to examine whether the oral dying declaration narrated by Anil Kumar Pokharyal P W 6 and Anil Kumar son of Sita Ram P W 7 both of whom also stated about the presence of S I Naresh Chaudhari at that time could be relied upon or the dying declaration as argued by the counsel for the appellant was cooked to fasten the guilt on the appellant as no evidence was forth coming against him We have already while dealing with the statements of Rajneesh and Jagdish Prasad, pointed that none of them corroborate the prosecution case regarding motive Rajneesh P W 2 is the landlord of the accommodation wherein the father of the deceased resides as a tenant It has not been shown as to how the appellant was in a position to win Rajneesh who denied that two days earlier there had been a quarrel between the appellant and the deceased in his presence The witness Jagdish Prasad too could not be said to have reasons to side with the appellant The prosecution, it is thus clear, has not substantiated the circumstances which, according to it, led to the murder of Kishore Kumar

20 It is next to be seen that in the First Information Report there is an averment that many persons of the locality had seen the incident The prosecution did not disclose during the trial as to who were these persons, who had seen the appellant assaulting Kishore Kumar, but were not coming forward to depose against him The learned counsel for the appellant argued that from the above averment it only follows that the prosecution had made provision for improving upon the narration in the F I R in which design of theirs, they did not ultimately succeed

21 We then find that it is the common case of the parties that Praveen Kumar alias Pappi was the first amongst the witnesses examined to notice Kishore Kumar laying injured and it was he who had collected (contacted?) Ajai Kumar D W 1 and Dr Narendra Nath Sharma for providing him medical attention Praveen Kumar knew Kishore Kumar as both had been playing cricket together There is nothing in the cross-examination of Praveen Kumar to show that he had also been a friend of the appellant or he was subsequently won over by him Ajai Kumar D W 1, it is not disputed, had carried Kishore Kumar to the Medical College and had provided, as given out by him, his blood and medicines in connection with the treatment of Kishore Kumar He had also made available his Car to Dr Narendra Nath Sharma to get Dr Bhargava as early as possible and further to inform Anil Kumar Pokharyal brother of the deceased to come and do his best in connection with the treatment of Kishore Kumar He had got Kishore Kumar admitted in the Medical College and remained there as long as he could to provide such relief which he was capable of This witness who is an income-tax assessee and who had done so much for Kishore Kumar only as a good citizen could not be expected to come easily under the influence of the appellant so as to deny the truth Praveen Kumar P W 4 and Ajai Kumar D W 1 both stated that Kishore Kumar had not made any dying declaration Ajai Kumar also deposed that Kishore Kumar was not in such a position that one could talk to him or he could give a statement The statements of these witnesses receive support from the statement of the I O and the Bed Head Ticket of Kishore Kumar wherein it is noted that at the time of his admission his general condition was very poor and he was confused and in medical terminology was suffering from cerebral anoxia The doctors had also noted the rigid shifting dullness on his body His oementum was lying outside It was not unjustifiably argued by the learned counsel for the appellant that Kishore Kumar was not in a position to give full details of his assailant The prosecution, it also cannot be lost sight of, had not put to any of the doctors namely Narendra Nath Sharma P W 1, D D Agarwal P W 12 and S K Bhargava P W 9 as to whether Kishore Kumar was in a position to make statement No doubt the type of evidence insisted upon in the case of Satya Narain v State, reported in 1977 Cri LJ 1626 (All), is not a requirement now for in Mohd. Azizuddin v State of Andhra Pradesh, reported in 1985 Cri LJ 336, it has been held that mental fitness could be presumed by evidence other than medical certificate, but it will be wrong to infer that it is not necessary to ascertain that the person making the dying declaration is in a fit state of mind We find that in A M A Rahman v State of Gujarat, reported in AIR 1976 SC 1782 the importance of doctor has been emphasized in another way and a duty has been cast on him to record the dying declaration, if a Magistrate cannot be called in time It was as such in all fairness necessary for the prosecution to enquire from Dr N N Sharma and Dr D D Agarwal whether Kishore Kumar was in a fit state of mind to understand and to reply as they had occasion to examine Kishore Kumar before the arrival of Anil Kumar Pokharyal P W 6 Anil Kumar son of Sita Ram P W 7 and S I Naresh Chaudhari P W 10 and also because Dr D D Agarwal had recorded in the Patient Chart as indicated above that he had

found Kishore Kumar to be confused Dr Narendra Nath Sharma and Dr D D Agarwal were certainly the best persons to state about the ability of Kishore Kumar to understand and to give intelligible statement if the prosecution relied upon the oral dying declaration The prosecution, where it is in a position to elicit facts, does not do so although the I O himself says that when he met the injured, he was not in a position to speak cannot be permitted to say that the doubt should have been got cleared by the appellant in spite of the evidence on record generating the feeling that he might not be in a position to speak due to the injury sustained

22 We shall now proceed to examine as to how Anil Kumar Pokharyal P W 6 and Anil Kumar P W 7 fair on the touchstone of consistency which also is one of the methods for judging the credibility of a witness and whether or not there are such infirmities in their statements and also generally which give a caution about acceptance of the prosecution case Anil Kumar Pokharyal in the first information report has mentioned that Kishore Kumar was crying in pain that Deepak alias Dabbu of Hanumanpuri had assaulted him with knife He had two or three associates of his at that time and they fled away soon after In the F I R Anil Kumar Pokharyal had not alleged, as given out by him in the trial Court, that when he enquired from Kishore Kumar, he told him about his assailant

23 The First Information Report is also silent on the point that Anil Kumar P W 7 had been present in the Emergency Ward of the Medical College at the time of the above dying declaration of Kishore Kumar In the trial Court Anil Kumar Pokharyal P W 6 denied that while crying with pain Kishore Kumar was accusing the appellant Kishore Kumar has pointed to have disclosed the name of Deepak only after he had been specifically asked about it There can be no denying the fact that Anil Kumar Pokharyal, if his brother Kishore Kumar was in senses, must have put this question to him as to who had caused him the injury If, however, he was not in his senses, because of his very critical condition, the above question could not be put to him by a normal person The counsel for the appellant justifiably argued that if Kishore Kumar had been naming his assailant while crying because of pain as is the case set up in the F I R or if he had made the statement in reply to questions put in the presence of Junior Doctors the investigating agency would certainly have ascertained as to who those Junior Doctors were even if Anil Kumar Pokharyal had not been able to disclose their names Anil Kumar Pokharyal deposed that he could not make out as to who was Deepak alias Dabbu of Hanumanpuri who had assaulted Kishore Kumar even after listening to Kishore Kumar It does sound somewhat strange that though there had been a quarrel between Kishore Kumar and Deepak on 20-6-81 wherein the appellant had given the threat to take the life of Kishore Kumar and which quarrel could only be pacified through the intervention of their landlord Anil Kumar Pokharyal his brother, would have been ignorant about the same Anil Kumar Pokharyal pointed that he and Dr Narendra Nath Sharma were together in the Emergency Ward of the Medical College for five minutes while Kishore Kumar was admitted there and it was only when Dr Narendra Nath Sharma after leaving Anil Kumar Pokharyal at the gate of the Medical College, had gone to the house of Dr Bhargava a second time that the two were not together Dr Narendra Nath Sharma on not meeting Dr Bhargava again at his house was expected to have returned without wasting any time as he had been trying to procure the services of a good surgeon for Kishore Kumar in the shortest possible time It looks improbable that only during the short period when Dr Narendra Nath Sharma was away, Kishore Kumar gave the details of his assailant which is also not the prosecution case as set forth in the case diary If Dr Narendra Nath Sharma was not examined about the alleged dying declaration of Kishore Kumar, although his statement under Section 161, Cr P C shows that the dying declaration in question was made in his presence, it would follow that Dr Narendra Nath Sharma was not likely to have corroborated Anil Kumar Pokharyal P W 6 We have been inclined to draw such an inference

because in the instant case it could not be presumed at all that sufficient independent evidence had been led to prove beyond doubt that the dying declaration had been made The statement of Anil Kumar Pokharyal about the dying declaration having been made in the presence of junior doctors had been contradicted by Anil Kumar son of Sita Ram P W 7 and S I Naresh Chaudhari Anil Kumar son of Sita Ram P W 7 in his examination-in-chief stated that at the time of the dying declaration only Anil Kumar P W 5 and Sunil Kumar (the brother of the deceased) and a Sub-Inspector had been present In the cross-examination he gave out that Dr Narendra Nath Sharma was not present and apart from the above persons, there was another person It had been suggested by the prosecution to Praveen Kumar alias Pappi P W 4 that the dying declaration had been made in his presence but he was denying it The suggestion made to him appears to us to be without good basis as discussed above He has not corroborated Anil Kumar Pokharyal P W 6 and Anil Kumar son of Sita Ram P W 7 because they were not speaking the truth according to him Relating to Anil Kumar son of Sita Ram P W 7 there is this infirmity also as pointed out above that Anil Kumar Pokharyal did not allege in the F I R regarding his presence at the time of the dying declaration Besides it cannot also be lost sight of that his statement under Section 161, Cr P C was recorded as a witness of the inquest report on 3-8-81 i e six weeks after the incident The delay in recording the statement of this important witness of the dying declaration under Section 161, Cr P C has not been satisfactorily explained It is not ruled out in the circumstances of the case that Anil Kumar P W 7 who was described to be a friend by Anil Kumar Pokharyal P W 6 but who himself refuted this fact to show his independence and described himself merely as a colleague of the sister of the deceased, was introduced in the case as an afterthought to provide the padding in the prosecution case as Praveen Kumar P W 4, Ajai Kumar D W 1, Dr Narendra Nath Sharma P W 1, Dr D D Agarwal P W 12 and other doctors declined to affirm on oath that the dying declaration relied upon by the prosecution had been made by Kishore Kumar Anil Kumar P W 7 in his cross-examination could not tell as to how long Anil Kumar Pokharyal remained with Kishore Kumar This is not ignorance about an insignificant matter We have discussed above that Anil Kumar P W 6 could hardly have been in the Emergency Ward with Kishore Kumar for a little over five minutes when according to him the dying declaration was made as he had gone with Dr Narendra Nath Sharma to Dr Bhargava s clinic He also did not clearly state whether Anil Kumar had gone to call any doctor or not Anil Kumar Pokharyal according to Anil Kumar, had been putting the question to Kishore Kumar as to who had assaulted him just at the time when he arrived there He was confronted with his earlier statement allegedly made to the Investigating Officer under Section 161, Cr P C that Anil Kumar Pokharyal had made inquiry from Kishore Kumar about his assailant while going to call the doctor S I Jaideo Singh affirmed on oath that he did make the above statement attributed to him The statement of Anil Kumar P W 7 denying the presence of the doctors in the Emergency Ward is in conflict with the statements of Anil Kumar Pokharyal P W 6, Praveen Kumar P W 4, Ajai Kumar D W 1 and Dr Narendra Nath Sharma P W 1 and indicates that he had given an imaginary account We thus are of the view that Anil Kumar P W 6 and Anil Kumar P W 7 could not be relied upon for upholding the dying declaration set up by the prosecution

24 The investigation because of the introduction of the got up witnesses Anil Kumar P W 7 and S I N Naresh Chaudhary P W 10 not named in the F I R could not be said to be fair and it also becomes doubtful whether the F I R had really been lodged promptly

25 The prosecution, in our opinion, has not established the charge against the appellant under Section 302 read with Section 34 of the Indian Penal Code

The appeal is allowed The judgment of the 1st Additional Sessions Judge convicting the appellant under Section 302 read with Section 34 of the Indian Penal Code and sentencing him to undergo imprisonment for life is set aside The Appellant is on bail He need not surrender to his bail bonds which are discharged

Appeal allowed

1991 ALL L J 580

V K KHANNA AND
G P MATHUR, JJ

Haridwar Prasad Tulsiyan and another, Petitioners v Special Secretary, Finance (Entertainment Tax-Department), Govt of U P Lucknow and others, Respondents

C M W P No 17068 of 1990, D/- 25-3-1991

(A) Cinematograph Act (1918), S 9(3) — U P Cinematograph Rules 1951, Rules 3(3) and 7(2)(b) — Licence to construct cinema house — Proposed construction coming within radius of 75 metres from educational institution — Licence cannot be granted — Opinion of authorities of institution that construction would not cause disturbance is immaterial

Under the provisions of the rules what is to be seen is whether the proposed site is within a radius of 75 metres from any recognised educational institution Sub-rule (b) of Rule 7(2) of the Rules clearly lays down that no building shall be licensed if it is situate within a radius of 75 metres from any recognised educational institution If the site of the building is situate within the prohibited distance from a recognised educational institution no approval can be accorded under Rule 3(3) of the Rules The opinion of the principal or the Manager to the effect that the construction of the cinema hall will not cause any disturbance or will not affect the studies of the students is wholly irrelevant and cannot be taken into consideration while considering an application moved under Rule 3 of the Rules (Para 4)

(B) U P Cinemas (Regulation) Act (1955), S 12 — U P Cinematograph Rules, 1951, Rr 3(3) and 7(2)(b) — U P Rules made under S 9(3) of Cinematograph Act (1918) — Cinematograph Act repealed by Act of 1955 — Rules, however, are saved by S 12(2) of Act of 1955 and continue to be in force

(Para 5)

(C) U P Cinemas (Regulation) Act (1955), Ss 2(d), 13(2) — U P Cinematograph Rules, 1951, Rr 3(3) and 7(2)(b) — Rule making power of State Govt — It has power to make rules providing for prior approval of site and place of building

The Rules were framed by the U P Government in exercise of the powers conferred by S 9 of Cinematograph Act 1918 Sub-rule (3) of R 9 laid down that the State Government may make rules to provide for the regulation of cinematograph exhibition for securing the public safety The words 'securing the public safety' used in this sub-rule were of very wide import and the State Government could make Rule 3 in exercise of the power conferred by sub-sec (3) of S 9 Similarly S 13 of U P Cinemas (Regulation) Act 1955 gives the State Government power to make rules for the purpose of carrying the provisions of the Act into effect Sub sec (2) of S 13 provides that in particular and without prejudice to the generality of the foregoing power of rules made under the Act may provide for the situation and regulation of the places at which, and the conditions subject to which, exhibitions by means of cinematograph may be made S 2(d) provides that the word 'place' includes a house building, tent to other structure Therefore, the word 'place' will also include the site where the building of the cinema hall is proposed to be constructed Since sub-section (2) of S 13 of the Act gives power to the State Government to make rules to provide for situation and regulation of place at which exhibition by means of cinematograph may be given, as a corollary it gives power to the State Government to make a rule providing for prior approval of the site and plan of a building proposed to be constructed for giving cinematograph exhibition (Para 6)

(D) U P Cinemas (Regulation) Act (1955), S 5 — U P Cinematograph Rules, 1951 (framed under Act of 1918), Rr 3(3), 7(2)(b) — Licence for construction of cinema

-- Strict compliance is necessary — Sub stantial compliance is not enough

Under the Rules the licensing authority has a discretion in the matter and he may grant a licence on substantial compliance of some of the provisions of the rules However, with regard to the restriction imposed by cl (aa) of S 5(1) and cls (a) and (b) of R 7(2) of the Rules, the licensing authority cannot grant a licence unless the requirements of the provisions have been strictly complied with and a mere substantial compliance is not enough Since in the present case the proposed site was situate within 75 metres from a recognised educational institution as provided in cl (b) of R 7(2) of the Rules a mere substantial compliance of the Rules would not entitle a grant of certificate in favour of the petitioners and such a certificate could only be granted if the provisions of the Rules had been strictly complied with (Para 7)

Cases Referred		Chronological Paras
1985 All LJ 626	AIR 1985 SC 1108	10
1970 All LJ 973	ILR (1970) 2 All 487	11

B D Mandhyan, for Petitioners Standing Counsel for Respondents

G P MATHUR, J — The petitioners moved an application on 20-5-1988 before the District Magistrate, Deoria, under Rule 3 of U P Cinematograph Rules, 1951 (herein after referred to as the Rules) for grant of a certificate of approval, for constructing a permanent building to be used for cinematograph exhibition on plots Nos 892 and 893 situate in Kasia town in the district of Deoria The District Magistrate who is the Licensing Authority as defined in sub-rule (vii) of Rule 2 of the Rules got necessary inquiries made After inquiry it was found that the site on which the petitioners wanted to construct the building was situate within a radius of 75 metres of Mahanirvan Sanskrit Mahavidyalay Since the site proposed by the petitioners was within the prohibited distance as mentioned in sub-rule (b) of Rule 7(2) of the Rules the application for certificate of approval was rejected by the Licensing Authority on 24-2-1990 The petitioners then filed an appeal before the State Government which was also dismissed on 26-4-1990 The present writ petition has been filed for quashing of the aforesaid orders dated 24-2-1990 and 26-4-1990 and also for a writ of mandamus directing the respondents to allow the application of the petitioners dated 20-5-1988

2 Counter and rejoinder affidavits have been exchanged

3 We have heard learned counsel for the parties and we propose to dispose of this petition finally at the admission stage in accordance with the Rules of Court

4 Learned counsel for the petitioner has contended that another cinema hall within a radius of 75 metres of the Sanskrit institution was already in existence and the running of the said cinema was not causing any disturbance to the studies of the students of the aforesaid Sanskrit institution He also contended that the Pracharya (principal) of the institution has given in writing that the construction of the proposed cinema hall will not cause any adverse effect on the studies of the students The building of the cinema hall is constructed in such a manner that it becomes sound proof and will not cause disturbance of any kind It was contended on behalf of the respondents that the Mahanirvan Sanskrit Mahavidyala was affiliated to Dr Sampurnanand Sanskrit University and was imparting education up to Shastri class which was equivalent to B A degree The Sanskrit institution was in existence for the last several years It was further contended that the Manager of the institution by his letter dated 20-2-1990 had raised objection to the construction of the cinema hall on the proposed site and had also informed that the petitioners had obtained some writing from the principal by playing fraud The Manager had also informed that more than 100 students were getting education in the institution and the construction of the cinema hall seriously affect their studies The State Government has recorded a finding that in case approval was given for construction of the cinema hall on the site proposed by the petitioners it will cause disturbance and will seriously affect the working of the educational institution In our opinion what is to be seen is whether the

proposed site is within a radius of 75 metres from any recognised educational institution Sub-rule (b) of Rule 7(2) of the Rules clearly lays down that no building shall be licensed if it is situate within a radius of 75 metres from any recognised educational institution If the site of the building is situate within the prohibited distance from a recognised educational institution no approval can be accorded under Rule 3(3) of the Rules The opinion of the principal or the Manager to the effect that the construction of the cinema hall will not cause any disturbance or will not affect the studies of the students is wholly irrelevant and cannot be taken into consideration while considering an application moved under Rule 3 of the Rules Since the Licensing Authority has recorded a finding that the site over which the petitioners wanted to construct a permanent building for a cinema hall was within a radius of 75 metres from a recognised educational institution the application moved by the petitioners was rightly rejected

5 Learned counsel for the petitioners then contended that U P Cinematograph Rules, 1951, were made by the U P Government in exercise of the powers conferred by Section 9(3) of the Cinematograph Act, 1918, but this Act was repealed by Section 12(1) of U P Cinemas (Regulation) Act, 1955, and, therefore, the rules also stood automatically repealed The contention raised by the learned counsel is wholly misconceived Sub-section (2) of Section 12 of the U P Cinemas (Regulation) Act, 1955, lays down that any rule made under the Cinematograph Act, 1918, and in force immediately before the commencement of this Act, shall continue to be in operation Therefore, U P Cinematograph Rules, 1951, were not repealed and continue to be in force

6 It was next contended that the U P Cinemas (Regulation) Act, 1955, only contemplates grant of a licence to give an exhibition by means of cinematograph and it does not contemplate grant of approval to the site on which the proposed building is to be constructed and, therefore, Rule 3 was ultra vires and was beyond the rule making power As stated earlier the rules were framed by the U P Government in exercise of the powers conferred by Section 9 of Cinematograph Act 1918 Sub-rule (3) of Rule 9 laid down that the State Government may in the rules to provide for the regulation of cinematograph exhibition for securing the public safety In our opinion the words securing the public safety used in this sub-rule were of very wide import and the State Government could make Rule 3 in exercise of the power conferred by sub-section (3) of Section 9 Similarly Section 13 of U P Cinemas (Regulation) Act, 1955, give the State Government power to make rules for the purpose of carrying the provisions of the Act into effect Sub-section (2) of Section 13 provides that in particular and without prejudice to the generality of the foregoing power rules made under the Act may provide for the situation and regulation of the places at which and the conditions subject to which exhibitions by means of cinematograph may be made Section 2(d) provides that the word place includes a house building tent or other structure Therefore the word place will also include the site where the building of the cinema hall is proposed to be constructed Since sub section (2) of Section 13 of the Act gives power to the State Government to make rules to provide for situation and regulation of place at which exhibition by means of cinematograph may be given as a corollary it gives power to the State Government to make a rule providing for prior approval of the site and plan of a building proposed to be constructed for giving cinematograph exhibition

7 Learned counsel for the petitioner then contended on the basis of Section 5 of U P Cinemas (Regulation) Act 1955, that only substantial compliance of the Rules was required and the application moved by the petitioners for the grant of approval had been illegally rejected In order to appreciate the argument advanced by the learned counsel it will be useful to quote the relevant provision of Section 5 —

'5 Restrictions on the powers of licensing authority

(1) The licensing authority shall not grant a licence under this Act, unless it is satisfied that—

(a) The rules made under this Act have been substantially complied with, and

(aa) the building or other place in which cinematograph exhibition proposed to be given—

(i) is situated at a distance of not less than 200 metres from the Raj Bhawan, the State Government Secretariat the High Court the State Public Service Commission or the Board of Revenue,

(ii) is situated at such minimum distance as may be prescribed from other public buildings and from recognised educational and other public institutions and public hospitals,

.

A perusal of Section 5(1) will show that it is in several parts Clause (a) lays down that the licensing authority shall not grant a licence unless it is satisfied that the rules made under the Act have been substantially complied with However clause (aa) of Section 5(1) is not qualified by the words substantially complied with' It is therefore clear that so far as clause (aa), which relates to the minimum distance of the building in which cinematograph exhibition is proposed to be given, from Raj Bhawan, Secretariat, High Court and recognised educational institutions etc is concerned it has to be strictly complied with Rules 8 to 26 provide for the nature of the permanent building ventilation, sanitation, seating accommodation exits, electrification machines and storage etc Clause (a) will cover the requirements of Rules 8 to 26 in its ambit We should not be understood to be laying down that mere substantial compliance of Rules 8 to 26 of the Rules will entitle a cinematograph exhibitor to obtain a licence, but the rules do show that the licensing authority has a discretion in the matter and he may grant a licence on substantial compliance of some of the provisions of the aforesaid rules However, with regard to the restriction imposed by clause (aa) of Section 5(1) and clauses (a) and (b) of Rule 7(2) of the Rules, the licensing authority cannot grant a licence unless the requirements of the aforesaid provisions have been strictly complied with and a mere substantial compliance is not enough Since in the present case the proposed site was situate within 75 metres from a recognised educational institution as provided in clause (b) of Rule 7(2) of the Rules, a mere substantial compliance of the Rules would not entitle a grant of certificate in favour of the petitioners and such a certificate could only be granted if the provisions of the Rules had been strictly complied with The contention raised by the learned counsel has, therefore, no substance and is liable to be rejected

8 It was then contended that under Section 10 of the 1955 Act the State Government had the power to grant exemption from any of the provisions of the Act or the Rules made thereunder and the petitioners' application for grant of approval should have been allowed after granting exemption from the provisions of clause (b) of Rule 7(2) From the record of the case we do not find that any application had been moved by the petitioners for the grant of exemption in their favour Section 10 of the Act confers power of exemption only to the State Government and not to the licensing authority There is no averment in the writ petition that the petitioners made any application for grant of exemption nor copy of any such application has been filed Since the petitioners did not make any application for grant of exemption there was no question of exercising such a power by the State Government under Section 10 of the Act If the petitioners move such an application before the State Government now the same may be considered by it in accordance with law

9 Learned counsel for the petitioners also contended that towards north-west of the proposed site another cinema hall by the name of Jaiprakash Chitra Mandir' is already running since 1972 and therefore the petitioners should have been given a certificate of approval He also contended that another cinema hall with the name of 'Pratibha Chitra Mandir was granted licence although it has been constructed just adjacent to the Secretariat building in Lucknow which showed that strict compliance of the Rules was not being insisted upon by the licensing authorities or the State Government In our

opinion the contention raised by the learned counsel is wholly misconceived The necessary details of the aforesaid two cinema halls have not been placed on the record nor it has been mentioned as to when the certificate of approval was granted in their favour It may be mentioned here that sub-rule (2) of Rule 7 has been amended by Notification No XXL (1)/1973-GAD-1 dated August 1, 1974 Prior to the amendment there was a proviso to sub rule (2) of Rule 7 which gave power to the District Magistrate/Licensing Authority to relax the rule This provision has been deleted with effect from 1st August 1974 Therefore, the petitioners cannot get any benefit from the mere fact that previously some other cinema halls had been given licence although they were situate within the prohibited distance

10 Learned counsel for the petitioners has placed reliance on a Supreme Court decision in State of U P v Raja Ram Jaiswal, AIR 1985 SC 1108 (1985 All LJ 626) in support of his submission that the petitioners' application for grant of approval was wrongly rejected In our opinion the Supreme Court case is clearly distinguishable on facts In the aforesaid case the certificate of approval as envisaged by R 7(2)(b) of the Rules was granted on March 24, 1972 on the finding that Hindi Sahitya Sammelan was not an educational institution within the contemplation of Rule 7(2)(b) After the cinema building had been completed an application was made on May 25, 1975 for granting a licence under Section 3 of the U P Cinemas (Regulations) Act, 1955 This application was rejected It was in these circumstances that the Supreme Court observed that while granting the certificate of approval the question whether a particular institution is an educational institution and is within or outside the prohibited distance is examined and a decision is reached that the institution is not educational institution within the contemplation of the relevant Rule nor it is within the prohibited distance, that aspect cannot be reviewed to refuse the grant of a licence under Section 3 read with Section 5 in the name of public interest In the present case the petitioner's application for grant of certificate of approval under Rule 3 itself has been rejected and the stage to grant a licence under Section 3 of the Act has not reached at all

11 Learned Counsel for the petitioners also placed reliance on the case of St George High School v State of U P 1970 All LJ 973 This decision is of no assistance to him as it relates to a period prior to amendment of Rule 7(2) of the Rules and does not concern the controversy now involved

12 The writ petition lacks merit and is accordingly dismissed There will be no order as to costs

Petition dismissed

1991 ALL L J 584

GIRIDHAR MALAVIYA J

Vishwanath Chakrawarti Petitioner v Smt Anjali Chakrawarti and others Respondents

Crl Misc Appln No 1261 of 1982 D/-5-3-1991

Criminal P C (2 of 1974), S 125 — Maintenance — Grant of to wife — Subsequent divorce petition by husband — Ex parte decree in his favour — Suit neither contested nor ex parte decree sought to be set aside by wife — Wife not disentitled from claiming maintenance (Para 6)

Cases Referred	**Chronological Paras**
1989 All LJ 732 1990 Cri LJ 961 (FB)	3

Yatindra Singh, for Petitioner Krishna Mohan, for Respondents

ORDER — This application under Section 482, Cr P C has been preferred against the order dated 17-12-1981 passed by the 8th Addl District Judge Allahabad in Criminal Revision No 463 of 1981 whereby he upheld the order dated 22-6-1981 passed by the Chief Judicial Magistrate Allahabad on the application by the applicant for cancelling the order by which the applicant was directed to pay Rs 100/- per month to his wife and Rs 75/- to his daughter per month by way of maintenance under Section 125, Cr P C

EI/FI/A560/91/HK

2 The crux of the matter is that applicant was married to Smt Anjali Chakrawarti, the opp party on 17-1-1975 On 25-3-1976, an application under Section 125, Cr P C was moved by the Opp Party Smt Anjali Chakrawarti which was allowed, as indicated above, by the Magistrate on 28-2-1977 Without adverting to the other details in respect of the proceedings it will be enough to mention that this order dated 28-2-77 granting maintenance to Smt Anjali Chakrawarti and her daughter was confirmed by the High Court in Criminal Revision No 21 of 1978 passed on 4-1-1980 However, in between, on 27-8-1979, the petitioner had filed a matrimonial petition No 162 of 1979 for divorce This petition was decreed ex parte on 10-1-1980 by the 1st Addl District Judge Allahabad After the divorce had been granted ex parte to the applicant, he on 15-12-1980 had moved the application along with an affidavit for the cancellation of the maintenance award As according to him, he had also sought a relief in his divorce-petition for the restitution of conjugal rights It was pleaded by the applicant that as the decree for the divorce, in which the restitution of conjugal rights had also been claimed as a relief, had been passed and had become final, it should now be held that despite a decree for the restitution of conjugal rights, the opp party without any sufficient cause was refusing to live with the applicant Consequently, the application under Section 127, Cr P C was sought to be allowed, as if the wife refused to live with her husband without any sufficient cause, then according to the applicant, she was no longer entitled to maintenance Her application having been dismissed by the Chief Judicial Magistrate and the revision against the order preferred by the applicant having been also dismissed by the 8th Addl District Judge, Allahabad, this application under Section 482 Cr P C was filed which was admitted on 1-3-1982 and a conditional stay order was granted whereby the recovery of the maintenance had been stayed on the applicant depositing the entire amount of maintenance as granted by the Magistrate up to 31-1-1982 and on the applicant thereafter depositing a sum of Rs 100/- only per month until further order of this Court

3 I have heard learned counsel for the applicant as also for the opp party At the outset an objection has been raised by learned counsel for the opp party that in view of the Full Bench Judgment in the case of N K Rawel v Nidhi Prakash reported in 1989 All LJ 732 an application under Section 482 Cr P C is not maintainable after the revision for the same party had been dismissed by the revisional Court Learned counsel for the petitioner does not dispute this proposition but argued this case to say that if there may otherwise be merit in his contention, then he may be permitted to convert this application filed under Section 482, Cr P C into a petition under Article 226 of the Constitution

4 Coming to the merits of the case, it may be stated that the learned 8th Addl Sessions Judge, Allahabad in para 6 of the judgment has held as follows —

> A certified copy of the judgment of the 1st Addl District Judge, Allahabad dated 10-1-1980 is on the file of the learned trial Court It nowhere shows that petition was for restitution of conjugal rights In the judgment it is clearly mentioned that the petition for divorce was 'on the ground of' desertion and cruelty The petition was decreed ex parte and it cannot in any way mitigate the liability of the revisionist to pay the maintenance allowance awarded by the learned trial Court '

5 Learned counsel for the applicant has not disputed the correctness of this observation, as he possibly cannot do, since the said judgment had been annexed as annexure-2 to the application which bears out the facts mentioned above, but his contention is that in his petition for divorce, which is annexure-1 to the present application u/S 482, Cr P C, he had clearly sought the relief of restitution of conjugal rights also vide para 12(a) His contention is that as the suit was not contested by Smt Anjali Chakrawarti, nor was the ex parte decree got set aside by her, it should be presumed that she had consented to the relief for the restitution of conjugal rights as claimed by applicant in his plaint It is consequently urged that having impliedly consented to live with the applicant, by her not filing any written statement, it should now be presumed

that there is no sufficient cause available to Smt Anjali Chakrawarti to refuse company of the applicant and hence the maintenance awarded to her has to be quashed

6 It is difficult to accept even this proposition Normally any person against whom an ex parte decree is passed can go to the court and get the decree set aside by showing adequate cause as to why that party could not contest the proceedings However, in the instant case the decree passed by the court concerned was a decree for divorce As even a divorced wife is entitled to maintenance, the possibility cannot be ruled out that on coming to know about the existence of an ex parte decree for divorce against her, Smt Anjali Chakrawarti did not deem it necessary to move the same set aside, as even after the divorce, she was entitled to claim maintenance till one got married again It was on this ground that the court below had refused to grant the relief to the applicant on his application u/S 127, Cr P C Consequently even otherwise, there is no merit in this contention of the applicant

7 Learned counsel for the applicant Sri Yatindra Singh has also placed reliance on the 40th Report of the Law Commission of India which was considering the question of amending S 488 of the Criminal Procedure Code of 1898, wherein it had been recommended that even if the divorced wife was granted maintenance, there should be a provision which should read as follows

> "On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband or that they are living separately by mutual consent, the Magistrate shall cancel the order " (Underlined by me)

Emphasising on the underlined portion, learned counsel contended that the intention of the Law Commission was that if and when a wife had herself agreed to live separately, she was not entitled to any maintenance

8 Whatever might have been the intention of the Law Commission, since there is no such provision under the amended provisions of S 125 Cr P C it is not possible to refuse maintenance to a woman if she is living separately from her husband even if it may be the case of a presumed consent

9 Under the circumstances there is absolutely no ground on which the orders of the courts below could be interfered with, even if this application was to be converted into a writ petition under Art 226 of the Constitution of India

10 I may add, that Sri Yatindra Singh learned counsel for the applicant had mentioned that if I found merit in his contention, then only this petition may again be listed for hearing and he may be granted an opportunity to convert this application into a writ petition failing which the judgment itself may be pronounced on this application on merit As I find no merit in the contention of Sri Yatindra Singh consequently the judgment is being delivered which had been reserved after an argument in the present case

11 This application u/S 482 Cr P C is dismissed The stay order passed on 1-3-1982 to the effect that the applicant had only to pay Rs 100/- per month w e f 1-2-1982 and not Rs 175/- per month towards the maintenance of his wife and daughter is hereby vacated

Petition dismissed

1991 ALL L J 586

= 1991 Cri L J 1606

PALOK BASU, J

V Kothari and others Petitioners v State of U P and others Respondents

Crl Misc Appln No 6549 of 1989 D/ 25 1 1991

Criminal P C (2 of 1974), S 482 — Complaint filed alleging commission of offences under Sections 406 and 420 Penal Code — Ingredients of sections made out by material on record — Issuing of process by magistrate to accused prima facie correct — Complaint cannot be quashed since the case does not fall within the rule of law laid down

CI/CI/A208/91/MVJ

in AIR 1960 SC 866 — Mere filing of civil suit or pendency of arbitration proceeding cannot absolve responsibility of criminal court to punish guilty

AIR 1960 SC 866, Followed

(Para 19)

Cases Referred	Chronological	Paras
1988 Cri LJ 853	AIR 1988 SC 709	18
1985 Cri LJ 817	AIR 1985 SC 628	14
1980 Cri LJ 1329	AIR 1981 SC 81	16
AIR 1979 SC 850		9
AIR 1978 SC 326		9
(1970) 3 SCR 765	1970 (1) SCC 521	15
AIR 1968 SC 700		9
1960 Cri LJ 1229	AIR 1960 SC 866	19
1960 Cri LJ 1250	AIR 1960 SC 889	17

Sri C L Bahl for the Applicants

ORDER — Both the aforesaid applications arise out of the complaint filed by the opposite party No 2 Sudhir Chopra numbered as Complaint Case No 2617/89 under Section 420/406/120 B IPC of the Court of Chief Judicial Magistrate Moradabad against the 11 accused the applicant V Kothari and M/s Sunds Defibrator AB being accused Nos 1 and 11 respectively In both the cases State of U P and Sudhir Chopra are opposite parties Nos 1 and 2 respectively Since the two applications relate to the same complainant case they were heard together and are being disposed of by this judgment

2 Sudhir Chopra claimed himself to be the Vice President of a Company known as Best Boards Limited having its factory at Gajraula Police Station Gajraula District Moradabad U P The allegations in the complaint in short are that M/s Sunds Defibrator AB is a company with its registered office at Sweden This company works in India through its representatives such as accused Nos 4 to 10 There is another company arrayed as accused No 3 while accused Nos 1 and 2 are its executive and manager An agreement was entered into between the complaint Company with the accused who are in league with each other for establishing a Dagasse Based Medium Density Particle Board Plant, Laminating Plant and Thermo-Oil Plant the cost of which project runs into several crores of rupees The accused were responsible for supply of equipment and materials according to specifications and for that purpose executed bank guarantees to gain confidence of the complainant company On the said assurance the complainant company made payments towards costs of the machinery equipments and materials by letters of credit opened in the bank According to the terms of the contract it was the responsibility of the accused persons to erect and fix all the machinery equipment and materials according to the guarnateed performance parameters stipulated in the contract Due to default of the accused persons the plant could not commence in December 1987 as per the contract because several defects were detected in the equipments and materials supplied by the accused for which various letters were written The plant could be completed with difficulty on 12 1 1989 but it could not function up to the guaranteed parameters and various defects and deficiencies were detected in the performance of the plant In February 1989 one Mr Boll of M/s Panndorf of West Germany came to the Project site and informed that the Dryer which had been manufactured by their firm was of a different specification and lessor efficiency than that contracted by the accused and it was not possible for the plant to achieve the guaranteed performance parameters since the equipments supplied by the accused persons was not of contracted quality specification and efficiency The complainant then got the other equipment also examined and found that they were substandard and not according to specifications By letter dated 15 2 1989 the accuseds persons were asked to remove and replace the deficient equipments Several meetings were held letters and telexes were sent but the accused did not pay any heed The accused knew that the equipment and materials were not of the stipulated specifications and efficiency and were substandard They knew that they were not supplying the equipment and materials as promised by them During the course of erection, fixation mechanical tests etc the

accused persons were entrusted with various spareparts belonging to the complainant's company on the specific understanding that the accused persons would return them or pay costs to the complainant company but they have refused to do so. The accused have unilaterally refused to work any further vide their letter dated 28 3 1989. The intention of the accused persons was dishonest and was designed to cause wrongful loss to the complaint company and wrongful gain to themselves. This dishonest intention was camouflaged by them and the complainant company was beguiled by their statements and assurance considering them to be gentlemen. Had the complainant known that dishonest intention he would not have paid them large sums of money at all. The accused had cheated the complainant company and have committed criminal breach of trust in respect of equipments and materials worth crores of rupees and have committed offences punishable under Section 420/406/120 B of the I P C

3 In support of the complaint allegations the complainant examined himself under Section 200 Cr P C on 2 5 1989 and examined Wing Commander Rajendra Kumar Chaudhary as his witness under Section 202 Cr P C on 4 5 1989. The Chief Judicial Magistrate Moradabad has by his reasoned order dated 29 5 1989 summoned all the eleven accused and later on bailable warrants by way of process was issued by him. Felt aggrieved by the summoning order accused No 1 and accused No 11 have filed the aforesaid two Criminal Misc Applications, praying that the complaint the summoning order and the further proceedings in the said complaint case be quashed

4 In Criminal Misc Application No 6549 of 1989 counter affidavit has been filed by Sudhir Chopra seriously contesting the allegations made in the affidavit in support of the application and he has made an application praying that the interim order whereby the proceedings before the Chief Judicial Magistrate were stayed to be vacated the application be decided at the earliest and it should be dismissed. Rejoinder affidavit has also been filed on behalf of V Kothari. It has been mentioned in the array of the parties that Mr V Kothari and others are petitioners but no details of any other accused petitioner have been given. It follows that the former application is therefore by V Kothari alone and is treated as such

5 Sri P N Dudy Senior Advocate appeared on behalf of the applicant in both the cases. Sri Devender Nath Dwivedi Advocate has appeared on behalf of complainant Sudhir Chopra. The State of U P has been represented by Sri Surendra Singh learned Assistant Government Advocate who said that from the allegations made in the complaint no case for quashing thereof has been made out

6 The primary point canvassed by Sri Dudy was that the complaint case should not proceed before a Magistrate as intricate question of Civil Law of accounting of examining specifications of scientific and engineering data specifications are involved. It was argued by him that according to the tripartite agreement any dispute between the complainant and the accused had to be settled only by reference to arbitration. In this connection it was pointed out that the matter has in fact been taken to the International Chamber of Commerce Paris. It was further argued that Civil Suit No 402/1989 has been filed by the complainant in the court of the Civil Judge Moradabad who has stayed the proceedings therein because of the pendency of the arbitration proceedings in Paris. A true copy of the order has been filed along with rejoinder affidavit. On the strength of these two proceedings and also relying upon the terms of the agreement Sri Dudy argued that the criminal complaint amounts to an abuse of the process of the court and should be quashed

7 Sri Devendra Nath Dwivedi has while arguing the matter on behalf of the complainant stated that the two proceedings have been initiated one at Paris by way of arbitration proceedings and the other at

Moradabad through a civil suit Sri Dwivedi further stated that questions of Civil Law of accounting of examining specifications of scientific and engineering datas/specifications are involved He however argued that in view of the allegations made in the complaint it cannot be argued by the accused s counsel that no offence is made out or that there is any abuse of the process of the Court in the instant case and therefore these two clauses of S 482, Cr P C were not attracted He further said that he was doubtful as to the applicability of the Clause interest of justice' for the accused to get the relief claimed by them However he very rightly drew the attention of the Court to the agreement which has a specific clause that the Indian Law would apply on contravention of any of its terms or any dispute arising therefrom

8 From the facts stated in the complaint in the body of the petitions under Section 482 Cr P C the statement of the complainant and his witnesses before the Magistrate one thing is apparent that several crores of rupees belonging to the nation have evaporated while one proceeding is thwarted by another and another proceeding is sought to be shut up by yet another But on the production front nothing material is noticeable By filing a counter affidavit in this Court and challenging each and every word of the accused as have beem levelled in these petitions the complainant has tried to stand by every allegation made in his complaint and his statement under Section 200 Cr P C In other words the factual statements contained in the complaint have been reiterated by the complainant in his affidavit before this Court Therefore on record the complainant would like to show that he is serious with his complaint To repeat the allegations in the complaint are indeed serious prima facie

9 Sri Duda relied upon three decisions of the Hon ble Supreme Court reported in AIR 1968 SC 700 AIR 1978 SC SC 326 and AIR 1979 SC 850

10 In the first case it was held by the Hon ble Supreme Court that a transaction of sale cannot amount to an entrustment as cement was sold to its contractor solely for the purpose of being used in connection with construction work After delivery of the cement the Government has neither any right nor dominion over it With the aforesaid observations the Hon ble Supreme Court dismissed the Government Appeal filed against the acquittal of the accused by State of Gujarat

11 In the second case it was held by the Hon ble Supreme Court that to hold person guilty of the offence of cheating it was to be shown that his intention was dishonest at the time of making the promise Such dishonest intention cannot be inferred from a mere fact that he could not subsequently fulfil the promise In this case also the Hon ble Supreme Court declined to interfere with the acquittal of the accused and therefore dismissed the Government Appeal filed by the State of Kerala

12 In the third case the Hon ble Supreme Court held that dispute raised by the respondents in that case was purely of a civil nature even assuming the facts stated by him to be substantially correct Money must have been advanced to him and his partner by the financier on the basis of some terms settled between the parties On the face of the complaint highly exggerated version was given by the complainant that the police went to his house with a mob armed with deadly weapons and committed an offence of dacoity in taking away the truck This was held to be so unnatural and untrustworthy that it could not take the matter out of the realm of civil dispute Thus the Supreme Court quashed the complaint filed against the accused in that case under Sections 395 468, 465 471 412 120 B/34 IPC The said three cases are therefore clearly distinguishable from the facts of the instant complaint case

13 In this connection some other decisions of the Supreme Court on Ss 406 and 420. IPC and 482 Cr P C appear to be no less relevant and may be usefully noted here

14 In Pratibha Rani v Suraj Kumar reported in AIR 1985 SC 628 (1985 Cri LJ 817) the Supreme Court held that if the

ingredients of the offences were made out from the allegations in the complaint the High Court can and should not quash the complaint. It was further held that a criminal prosecution would not be completely barred merely because a civil remedy is or was available. Criminal Law and Civil Law can be taken recourse to even simultaneously because the two remedies are not mutually exclusive rather they are co-extensive. The two remedies essentially differ in their contents and consequences.

15 In Debabrata Gupta v S K Ghosh reported in 1970 (1) SCC 321 the Supreme Court refused to quash the process issued under Section 406, IPC by the Magistrate even though it was a case where one partner was prosecuting the other and admittedly a proceeding for arbitration had been initiated in the Calcutta High Court and a suit for dissolution of partnership and accounting was also pending.

16 In Hari Har Prasad Dubey v Tulsidas Mundhra reported in AIR 1981 SC 81 (1980 Cri LJ 1329) it was held by the Supreme Court that once Provident Fund amount was entrusted but was allegedly misappropriated the complaint could not be quashed only for want of some statutory Rules about its deposit.

17 In Jai Kishan Das v State of Bombay, reported in AIR 1960 SC 889 (1960 Cri LJ 1250) the Supreme Court has held that to establish a charge of criminal breach of trust the prosecution is not obliged to prove the precise mode of conversion of the property entrusted to him.

18 In Madhavrao J R Scindhia v S C Angre, reported in AIR 1988 SC 709 (1988 Cri LJ 853), the Supreme Court has (speaking through Hon'ble Rangnath Misra J as his Lordship then was) laid down that when a prosecution at the initial stage is sought to be quashed the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie established the offences. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient to permit the prosecution to continue. It has further been held that a case of breach of trust can both be a civil wrong and a criminal offence and there may be situations where it may predominantly be a civil wrong and may or may not amount to a criminal offence.

19 To say the least, the allegations made in the complaint fully make out the ingredients of Sections 406 and 420 IPC for which there was more than enough material on the record and therefore, the Magistrate's order issuing process to the accused applicants prima facie appears correct. Under such situation quashing of a complaint must depend upon the Rule of law laid down by the Supreme Court succinctly in the case of R P Kapoor v State of Punjab reported in AIR 1960 SC 866 (1960 Cri LJ 1239). In view of the aforesaid discussion of nearly the entire case law relevant on the point involved in the present case it has to be held that taking the allegations as they are in the complaint and as they appear in the statement of the complainant and his witnesses none of the three clauses i.e. passing of an order to give effect to an order under the Code of Criminal Procedure or to prevent abuse of the process of Court or otherwise to secure the ends of justice is available to the accused applicants. Mere filing of a civil suit or pendency of the arbitration proceedings by themselves would not absolve the criminal court of its responsibility to punish a guilty if from evidence the offences are made out.

20 Keeping in view the argument advanced by the respective counsel it may be observed that if the complainant so chooses he has a remedy under Section 320, Cr P C to compound the offences of the accused with the permission of the Court. Similarly, if criminal proceedings are desired to be stayed for a longer period that ordinarily done then the parties may make an application under Section 309, Cr P C before the Magistrate.

21 In view of the aforesaid discussions these applications under Section 482, Cr P C fail and are hereby dismissed. If any application under Section 309 or 320, Cr P C is moved it may be decided in accordance with law.

22 It is further directed that if the accused applicants surrender voluntarily before the Magistrate and apply for bail the said application may be disposed of in accordance with law on the day it is moved If an application for personal exemption is moved that may also be decided accordingly

23 The application having thus failed the interim orders dated 18 7 1989 and 15 2 1990 passed in the aforesaid two cases are vacated

Application dismissed

1991 ALL L J 591
= 1991 Cri L J 1610

H C MITAL AND M M LAL JJ

Narain Appellant (In Jail) v The State Respondent

Criminal Appeal No 1432 of 1978, D/ 19 10 1989

Penal Code (45 of 1860), Ss 300, 84 — Murder — Plea of insanity — Proof — Accused inflicted fatal injuries on deceased causing death — Accused not conscious of his act and apprehended on spot immediately after incident — Admitting his act in judicial confession — No motive for murder — Evidence showing that mental condition of accused was not of normal person — Protection under Section 84 could be given to accused

(Paras 36, 37, 38)

Cases Refferred	Chronological Paras
1969 Cri LJ 259 AIR 1969 SC 15	19
1964 (2) Cri LJ 472 AIR 1964 SC 1563	18 19

A D Prabhakar and P N Misra for Appellant Dy Govt Advocate for Respondent

H C MITAL, J — Narain has preferred this appeal against his conviction and sentence under Section 302 201 and 295A IPC to life imprisonment, seven years R I and three years R I respectively passed by Sri N N Sharma, the then District and Sessions Judge, Moradabad on 13th March 1978

2 The facts of the case according to the first information report (Ex Ka 1) submitted at police station Sambhal, District Moradabad at 7 a m are that at 5 30 a m the informant Akbar Ali (P W 1) had gone to offer prayer at the Jama Masjid as usual he had to remain standing outside the main door as the door was closed. There he met Ashfaq Hussain (P W 4) Ismail and other residents of the Mohalla who had also gone to offer prayers and when the door did not open they tried to get it opened and called the Mulla. When no response came from inside then one of them went up the roof and jumped inside and opened the door and then they all went inside They saw about seven persons, five or six of them managed to escape Inside the Masjid they found a dead body burning and a person was trying to drag it They caught hold of him and brought him to the police station that the dead body was of Imam Saheb of Jama Masjid that near the dead body they found burnt pages of Quran Sharif On the basis of the report a case was registered and the appellant was taken into custody The investigation followed After inquest report of the dead body its post mortem took place in the mosque itself as the crowd did not permit the dead body to be taken to the mortuary

Dr Man Mohan Sahai Mathur (P W 3) conducted the autopsy and prepared the post mortem report (Ex Ka 2) and following ante-mortem injuries were detected

1 Lacerated wound 4 cm x 3 cm on right side of scalp bone deep

2 Lacerated wound 2½ cm x 2 cm x bone deep on front of scalp 4 cm above right eye brow

3 Lacerated wound 8 cm x 3 cm x abdomen deep intestines were protruding out on left iliac fossa and were charred

4 Lacerated wound 6 cm x 4 cm x abdomen deep with intestines protruding out and charred.

5 Fracture of upper end of left femur with charred muscles around it and leg was attached with body with tags of muscles and skin

6 Lacerated wound 4 cm x 3 cm x bone deep on left side of chin and bone of left side of lower jaw fractured under it

The aforesaid injuries could have been caused by a blunt weapon like rod and were sufficient to cause instantaneous death

Following post mortem burns were detected

Skin of head face neck front of chest front of abdomen right upper limb, right lower limb were charred skin, muscles up to bone were charred and shrunken up to bone on left forearm left leg from thigh to ankle right leg below knee There was no charring or blackening on back from shoulder to hips

3 On internal examination doctor found skin of scalp charred and back There was depressed fracture of frontal bone and right temporal bones under injuries 1 and 2 membrane were congested and lacerated cerebrum on right side was lacerated in front Blood was present in frontal and right middle fossa, Parts of small intestines were protruding out of abdomen and charred, part of peritoneum was charred stomach was empty and pale Intestines contained gases and faecal matter Bladder was half full Death was due to shock and haemorhage caused by ante-mortem injuries The doctor also opined that victim could have met his death on the night of 28th and 29th Feb, 1976 and about 2 30 a m

4 The accused also made a judicial confession which was recorded by Sri Teerath Raj (P W 6) Addl Munsif Magistrate and thereafter on completion of the investigation charge-sheet was submitted and the appellant was committed to the Court of Session, where he was charged u/ss 147, 302/149, 201 and 295A, IPC and a charge u/s 302 IPC simpliciter was also framed against him The appellant pleaded not guilty to all the charges

5 The prosecution based its case on the following three circumstances only as there was no eye-witnesses of the murder

(i) apprehension of accused in suspicious circumstances from the spot

(ii) extra-judicial confession

(iii) Judicial confession

6 The learned Sessions Judge believed the prosecution evidence on the above circumstance (i) and (iii) but disbelieved the circumstance No (ii) hence he convicted and sentenced the appellant as above The death of Mohd Hussain Imam of Jama Masjid was homicidal and had taken place sometime in the night in between 28th and 29th Feb 1976 stands proved by the testimony of Dr M S Mathur (P W 3) It is further proved that death was caused due to the ante mortem injuries caused by some blunt object weapon like Lathi and Danda as the burn injuries were post mortem On behalf of the appellant the same has also not been challenged

7 On behalf of the appellant it has been urged that the prosecution has failed to prove to the hilt that the accused was apprehended from the mosque as alleged and that the judicial confession recorded by the Magistrate was not free from suspicion It was also urged that even if in the judicial confession and the evidence of the witnesses was believed then it was apparent that the accused was not in a state of sound mind when the alleged offence was committed and he did not understand the criminality of the nature of the act committed by him That apart according to the confession itself the deceased had first given two danda blows to the appellant and only thereafter the appellant after snatching that danda had wielded it on the deceased hence on that view of the evidence he had not committed any offence

8 In support of the contention that the arrest of the appellant in the circumstances as alleged by the prosecution was doubtful it was pointed out that in Ex Ka 8 Nakal Report No 6 dated 29 2 1976 at 6 15 a m there was no reference in the general diary that any person was apprehended on the spot and it was noteworthy that the entry made at the outpost Samthal P S Sambhal which is very

near to the scene of occurrence would have mentioned the fact of arrest of the accused as by that time it would have been generally known Ex Ka 8 contains as follows

' Ish Samatjanta Ke Longo Se Gyat Huq Ki Jama Masjid Par Kaphi Sahkhiya Me Musalman Jama Ho Rahe Hai Aur Shor Sharaba Ho Raha Hai '

Thereupon the head constable Kripa Shanker along with some constable left for the Jama Masjid and also informed on telephone to the police station To expect that at that time the head constable would have also known that the accused had been apprehended was not plausible and therefore if that fact was not mentioned there was nothing unusual about it and the entries only contained the information received

9 It was next contended that no injuries were caused to the accused by any of the witnesses although he is alleged to have been arrested soon after the incident and it was further argued that the nature of offence would have invited wrath of the Muslims especially after hearing the statement made to them by the accused himself Hence the absence of the injuries on his person indicated that either he was not arrested as alleged by the prosecution or the witnesses were convinced that he was insane

10 It is true that no such injuries were found on the person of the accused as normally should have been found if he was apprehended under the circumstances alleged particularly when the Muslims had come to know that he had killed their Imam of the Masjid and that he had also torn the Quran Sharif and burnt it On behalf of the prosecution there is no explanation of the absence of such injuries on the person of the appellant that circumstance no doubt raises a strong conviction to the fact that the persons who had apprehended him knew that he was an insane person and, therefore, they did not manhandle him and had taken him to the police station immediately after the arrival of Sub-Inspector, Sri Mathur

11- The fact that the appellant was apprehended inside the mosque has been fully corroborated by the testimony of P W 1 Akbar Ali, P W 2 Abdul Gafoor and P W 5 Mustaq Beg P W 4 Ashfaq Hussain has however, been reticent in stating whether this appellant was apprehended or not and has stated that he could not say whether this very appellant or somebody else was apprehended But a person was apprehended and he was taken to the Police-Station by Akbar Ali and others That apart, there is absolutely no reason to disbelieve the testimony of P W 15 S I H R S Mathur who had gone to the mosque along with the constables on receipt of the message on telephone from the police chauki and had taken Naram into custody Therefore there can be no doubt to hold that the appellant was apprehended from the mosque in question and taken to the Police Station Sambhal at 7 a.m by S I H R S Mathur and informant Akbar Ali and others

12 The reliability of the judicial confession has been challenged on behalf of the appellant on the following grounds

(1) The learned Magistrate did not ascertain the duration of the custody of the accused in jail nor he asked the accused as to how long the accused remained in custody of police nor he asked the accused from whose custody he had been produced

(ii) The learned Magistrate did not ascertain from the appellant the treatment meted out in jail

(iii) The learned Magistrate omitted to mention about the mental state of the accused prior to recording his confession nor any medical examination of the accused was conducted

(iv) The accused was not given sufficient time for reflection before his statement was recorded

(v) The learned Magistrate did not put a question to accused as to why he wanted to make confession

(vi) No record of any warning was maintained by the learned Magistrate prior to the recording of statement of the accused when time was given to him for reflection

13 It is true that recording of confession is an important matter and can in a given case constitute a very important circumstance in the trial nay the very foundation of conviction as in the present case It is also true that the learned Magistrate does not appear to have realised the seriousness and importance of how and what precaution should be taken before recording a confession It is however to be seen whether the lapses on the part of the Magistrate are such which may lead to the conclusion that the confession recorded by him ceased to be reliable The law is well settled that the act of recording confession is a very solemn act and in discharging his duties the Magistrate must take care to see that the various requirements of S 164, Cr P C are fully satisfied It is also settled in order that evidence of a confession of a prisoner may be admissible, it must be affirmatively proved that such confession is free and voluntary and that it was not proceeded by any inducement to the prisoner to make a statement held out by a person in authority or that it was not made until after such inducement had clearly been removed

14 In the instant case Sri Tirath Raj Judicial Magistrate had no interest in the conviction of the accused He cannot be regarded acting on behalf of the police or at their behest The prisoner had come from judicial custody and not from police custody Merely because 24 hours time or more than that time was not given after giving him a warning would not vitiate the confession unless it is found that it was not voluntary Merely because Sri Tirath Raj (P W 6) did not regard the warning which was given and simply recorded that he had warned the accused and in spite of that the accused was willing to make a confession and he recorded it would not mean that the warnings as required in law were not given particularly when in his statement on oath Sri Tirath Raj has stated the necessary warning which he had given to him It was not suggested to him that he had not given any warning That apart, the voluntariness of the confession cannot be doubted because besides the fact about which prosecution has given evidence namely that the accused had visited a Cinema carrying a danda and ladies purse with him and that he had taken milk at a restaurant It is also in the statement which could not occur to the investigating agency as stated by him that after beating the Imam burning the Quran etc he had left the mosque got into a standing bus on the Bus Stand remained lying there for sometime on its back seat Then again came out from the bus and again climbed over the mosque and occupied the place near the fire and started smoking Biri where he was found by the witnesses and apprehended This part of the statement of the confession is such which could not have been put in his mouth if the confession had not been voluntary Therefore after having considered all the objections raised we do not feel that there has not been substantial compliance of the various provisions of law while recording the confession which might vitiate it to be admissible in evidence and that it was not voluntary

15 In his judicial confession the appellant specifically admitted to have inflicted the fatal injuries with a danda to the deceased though he has also stated that he had been first hit by the deceased with that danda which he had snatched from the deceased and had wielded the same It is also proved that the deceased had died as a result of the injuries caused by the Danda blows In that view of the evidence that the appellant was apprehended from the mosque in the morning on 28th February 1976 taken to the police station and subsequently after a few days he made the judicial confession admitting to have caused injuries with a Danda with which he had been first hit by the deceased and thereafter he had placed him on the fire, it cannot be doubted that homicidal death of the deceased on account of the ante mortem injuries was due to the act of the appellant

16 Coming then to the main aspect, namely the claim of the accused for protection under S 84 of the Indian Penal Code we have to consider the relevant testimony not only of the defence witness but also of the prosecution witnesses To find out whether in terms of S 84 I P C it could or could not be said not beyond reasonable doubt but in all probability that at the time of the offence in question the accused by reason of unsoundness of mind was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law Before proceeding further it may be safely accepted as an undisputed fact emerging from the totality of the evidence that the accused was not a normal person and that his mental condition cannot be said to be that of a normal man

17 It is of course true that it is for the accused to discharge the burden that lies on him rebutting the presumption of sanity and bringing his case within the ambit of S 84 I P C Equally settled, however, is the legal position that this burden for onus on the accused is not as heavy as that on the prosecution

18 In Dahyabhai Chhaganbhai Thakkar v State of Gujarat AIR 1964 SC 1563 (1964(2) Cri LJ 472) it has been held that when a plea of legal insanity is set up the Court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law The crucial point of time for ascertaining the state of mind of the accused is that time when the offence was committed Whether the accused was in such a state of mind as to be entitled to the benefit of S 84 of I P C can only be established from the circumstances which preceded, attended and followed the crime According to S 105 of the Evidence Act, the burden of proving the existence of circumstances bringing the case within the exception lies on the accused and the Court shall presume the absence of such circumstances S 105 of the Evidence Act read with S 104 thereof, the court shall regard the absence of such circumstances as proved unless after considering the matters before it it believes that the said circumstances existed or their existence was so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that they did exist To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist by placing material before the Court sufficient to make it consider the existence of said circumstances so probable that a prudent man would act upon them The accused had to satisfy the standard of a prudent man If the material placed before the Court such as oral and documentary evidence presumptions admissions or even the prosecution evidence satisfies the test of prudent man, the accused will have discharged the burden The evidence so placed may not be sufficient to discharge the burden under S 105 of the Evidence Act but it may raise a reasonable doubt in the mind of a Judge as regards one or other of the necessary ingredients of the offence itself It may for instance raise a reasonable doubt in the mind of the Judge whether the accused had the requisite intention laid down in S 298 of the Penal Code If the Judge has such reasonable doubt he has to acquit the accused for in that event the prosecution will have failed to prove conclusively the guilt of the accused The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions

(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea and the burden of proving that always rests on the prosecution from the beginning to the end of the trial

(2) There is a rebuttable presumption that the accused was not insane when he committed the crime in a sense laid down by S 84 of the Penal Code the accused may rebut it by placing before the Court all the relevant evidence — oral documentary or circumstantial but the burden of proof upon him is no highest than that rests upon a party to civil proceedings

(3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence the

evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged

19 The principle laid down in Dahyabhai Chhaganbhai Thakkar v State of Gujarat, AIR 1964 SC 1563 (1964(2) Cri LJ 472) has also been reiterated in Jailal v Delhi Administration, AIR 1969 SC 15 (1969 Cri LJ 259) It has been held in that decision that on the question of insanity the state of mind of the accused before and after the crucial time is relevant If a person by reason of unsoundness of mind is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law he cannot be guilty of any criminal intent. Such a person lacks the requisite mens rea and is entitled to an acquittal The general burden is on the prosecution to prove beyond reasonable doubt not only the actus reus but also the mens rea

20 Although no hard and fast rule can be laid down and the conclusion would vary according to the facts and circumstances of each case, certain broad tests based on objective standards are generally looked into by Courts These are antecedent and subsequent conduct of the person accused of the offence Such conduct is not per se enough, but is relevant only to show what is the state of mind of the accused was at the time of the commission of the act Some indication of the precise state of the offender's mind at the time of the commission of the act is often furnished by the words of the offender used while committing the act or immediately before or after the commission Speaking generally the pattern of the crime, the circumstances under which it was committed, the manner and method of its execution, and the behaviour of the offender before or after the commission of the crime furnish some of the important clues to ascertain whether the accused had no cognitive faculty to know the nature of the act or that what he was doing is either wrong or contrary to law

21 In order to find whether the accused was by reason of unsoundness of mind incapable of knowing the nature of the act, a Court may rely not only on defence evidence, but also on what is elicited from the prosecution witnesses as well as on circumstantial evidence consisting of the previous history of the accused and his subsequent conduct in the surrounding circumstances including absence of motive Generally, a case in which the sanity of the accused is called in question, motivation for the crime with which he is charged assumes unusual importance because if a serious crime like murder is committed by a man, who had absolutely no rational motive to commit it, the plea of unsoundness of mind can be more easily established than in other cases

22 Now the relevant testimony has to be considered Prior to the occurrence regarding the conduct of the appellant there is evidence of P W 8 Ahmad Noor alias Babu (examined by the prosecution on 3 2 1978), that about two years back when he was sitting at the Kolhu of his uncle, appellant came there with a Purse and Danda and sat there and started talking without any sense then he said 'KATUON AAP KI KAZA GHER RAHI HAI' (Muslims your end is near) thereupon Shabir who was sitting there lost temper and got up to assault him but he was saved by Alim Uddin, who was also there and told Shabir, "ISHE AISE HI RAHNE DO" The accused thereafter left with the Purse and Danda

23 In his cross examination he further stated that when the accused had said "KATUON TUMHARI KAZA AA RAHI HAI ISH PAR SHABIR KO GUSSA AA GAYA THA ISH PAR ALEEM UDDIN NE YEH KAH KAR YEH NARAIN PAITIYA KA SIRRI HAI AUR KABHI KABHI AISE HI OONTPATANG BAKATA HAI BEECH BACHAO KAR DIYA THA "

24 P W 5 Aleem Uddin has also been

examined by the prosecution and has corroborated the above incident and stated that the accused was carrying a purse and danda and he came there and told them that their end was near Thereupon Habib picked up a danda and beat him but he had intervened Thereafter the appellant had said SAMBHAL JALA CONGG and then the appellant had left That on the same night murder of Imam Saheb of Jama Masjid had taken place According to the witness the appellant had made the above statement at about 9 p m in the same night. In his cross examination Aleem Uddin (P W 9) has further stated, JAB MULJIM KE YEH KAHNE PAR KI KATUON TUMHARI QAZA AAI HAI PAR SHABIR KO GUSSA AAYA THA TO MAINE USHE YEH KAH KAR ROK DIYA THA KI YEH NARAIN PAITIYA KA SIRRI HAI AUR AISI OONT PATANG BAAT KARTA HAT He further repeated that his statement was correct that Narain was Sirri and talked irrelevant but he still stated that he was not a mad person

25 P W 10 Kishan is a gate-keeper of Rama Talkies at Sambhal and he corroborated the prosecution case that on the night of the incident at abut 10 p m the appellant, Narain, had gone to see a picture carrying a Purse and a Danda that he got his Danda deposited on the gate and subsequently the Danda was given by him to the C I D Inspector on 21 3 1976 i e after almost a month In his cross examination this witness has also admitted that he had identified the witnesses in the Court because of his abnormal condition and behaviour as he was carrying a ladies Purse and Danda, that though he was not mad but was Sirri' and talked much

26 P W 12 Sohan Singh was examined by the prosecution to prove that the ladies purse recovered from the accused was seen by him earlier and he told him that he would give it in the marriage of his niece This witness is resident of village Paitia to which the appellant belongs In his cross examination he has stated that brothers of the accused have not given him any share of the land 'TABHI SE IS MULJIM KA, KAREEB DAS SAL SE, DIMAG KUCH SANKI SA HO GAYA HAI SANAK ME YEH KHUB OONT PATANG BATEN KARTA HAI AUR KABHI KABHI MARPEET BHI KAR BAITHTA HAI MAINE SUNA THA KE SANAK ME MULJIM NE RASHOOLPUR KE DOCTOR KA TRANSISTOR BHI UTHA LIYA THA

KAREEB SAT SAL PAHLE MULJIM NE APNA BAKRA KAAT LIYA THA AUR SAR AUR DHAR KO MILA KAR SAMNE BAITH GAYA THA AUR KAHTA THA KI MAI ISHKO JINDA KAR DOONGA AAZSE KAREEB CHAR SAL PAHILE ISH MULJIM NARAIN NE APNI LARKI KE MAR JANE PAR APNI JANG KAAT KAR KHOON LARKI PAR CHARAYA THA KI YEH KHOON LARKI KO JINDA KAR DEGA YEH MULJIM KABHI KABHI APNE KO BHAGWAN KA AVTAR BHI BATATA THA MULJIM SAMBHAL KI JAMA MASJID KO HARIHAR KA MANDIR BHI BATATA THA YEH MULJIM PAGAL NAHI HAI SIRRI HAI"

27 Now coming to the conduct of the accused at the time of the occurrence P W 1 Akbar Ali, the informant has stated in his examination in chief itself that when he found the accused inside the mosque, warming himself near the fire and enquired whether Imam was there, he replied YAHAN KOI MULLA ULLA NAHIN HAI AB ALHA UDAL KA RAJYA HAI The witness has further stated in his cross examination that the witness was warming himself near the fire and when he was accosted, he told as above and did not try to escape from there

28 P W 4 Ashfaq Hussain admitted in his cross examination by the State Counsel (as he was declared hostile because he refused to identify the accused to be the person at the scene of occurrence that he had correctly stated in his statement under S 161, Cr P C MULJIM NE KAHA USHNE HARIHAR KE MANDIR ME JAL CHARHYA THA THAND LAGNE KE KARAN QURAN SHARIF, TAT KE PARDE? BANSH, AADI JALAYEE THI MULLA NE AAKAR USHE DO DANDE MARE ISHLIYE USHNE

MULLA KO USHI DANDE SE KHUB MAARA AUR JAN MAR DIYA MULLA KI LASH KO JALA DIYA

29 P W 5 Mushtaq Beg has also stated that on being asked the accused had said YEH HARIHAR JI KA MANDIR HAI ISHME JAL CHARAYA THA JARA LAGNE KI BAJAH SE QURAN SHARIF WA PARDE AUR ALMARI BHI JALA DALE MULLA NE MERE DO DANDE MARE MAINE WAHI DANDA CHHEEN KAR MULLA KO BAHUT MARA AUR JAN SE MAR DALA AUR KHOON UCHHAL DIYA AUR MULLA JI KO JALA DIYA

30 There is also evidence of P W 3 Dr Manmohan Sahai Mathur who had done the autopsy on the dead body of the deceased and had examined the mental condition of the accused in the district Hospital from 26th April to 5th May 1976 He has stated in his cross examination that he had found abnormality in the accused but he could not say whether the mind of the accused was also abnormal on account of the abnormality noted by him and therefore he had referred the case for further investigation

31 Dr Anil Kumar Agarwal (D W 1) was Reader in King George Medical College Lucknow and the appellant was sent there for expert opinion regarding his mental condition Even though he had given a report against the accused to the effect that he had found that the accused was not insane even then he was examined by the defence but he admitted JO AADMI BAKRE KE SAR AUR DHAR KO KAT KAR ALHDA KAR DE AUR PHIR YEH KAHE KI MAI ISHE JINDA KAR DOONGA YE APNI LARKI KE MAR JANE PAR APNI JANGH KAT KAR KHOON LARKI PAR CHARAYA AUR USHKI JINDA KAR DOONGA YAH APNE AAP KO BHAGWAN KA AVTAR MANE YEH LAKCHAN PAGALPAN KE HI HO SAKTE HAI YA MASJID KO HARIHAR KA MANDIR KAHE YE KEWAL BINA KISHI CONTEXT KE YAH KAHTA HAI TAB YEH PAGALPAN KA LACHHAN HO SAKTA HAI

YADI KOI VYAKTI KAHTA HO KI KATUON TUMHARI QAJA KAHA HAI AUR SAMBHAL AUR SARAT TAREEK KO JALA DOONGA' AUR JO ULOOL JOOLOOL KAPRE PAHNE HO OONT PATANG BAKTA HO AUR LADIES PURSE LIYA HO AUR JISKI CASE HISTORY UPROKT HO TO AISEE HALAT ME USH VYAKTI KO KEVAL ISH HISTORY KE OOPAR BINA EXAMINE KIYE YEH KAHNA THEEK NAHI HOGA KI WAH VYAKTI SANKI YA PAGAL HAI KINTU YEH LACHHAN PAGALPAN KE HO SAKTE HAI SIRRI CRACK KO KAHTE HAI KOI AADMI AAP KA KAHNA NA MANE USHE BHI SIRRI KAH DETE HAI PAGAL KO BHI SIRRI KAHTE HAI PAGAL AADMI KE HARKAT KA DISTINGUISHING FEATURE INKE KAM BINA MOTIVE KE HOTE HAIN

32 Dr Agarwal thus stated as a medical expert that the aforesaid conduct indicated insanity and that the distinguishing feature in the conduct of a man is that his actions are without motive

33 It is in evidence that a large mohalla crowd had gathered and even then before the accused was taken to the mosque none of them gave him any beating This circumstance itself indicates and the only plausible and cogent explanation for such conduct on the part of the muslims who subsequently got so much infuriated could be that the Muslims who had gathered knew that he was not a sane person otherwise those very persons who did not permit the Investigating Officer to take the dead body after inquest report and the doctor had to come to perform post mortem in the mosque itself and that too at the personal request of the District Magistrate who had reached there and who could pacify the Muslims In spite of that the condition became so hot and almost beyond control that it led to riots and curfew had to be imposed All this is in the evidence of the Investigating Officer

34 To sum up, firstly it is in the evidence of P W 12 Sohan Singh that about ten years prior to evidence mind of the appellant was abnormal since his brothers had deprived him of his share in the land Due to that his behaviour became abnormal He used to talk nonsense and also indulged in violence and committed theft under his mental abnormal conditions About seven years prior to the evidence of the witness the appellant had cut down his goat and claimed to make it alive by joining its head with trunk When appellants daughter died about four years back he poured his blood after cutting his thigh and claimed that he would make her alive Sometimes he claimed himself to be an Avtar of God and used to call Jama Masjid of Samthal Temple of Harihar In the opinion of the witness he was SIRRI i e SIR PHIRA i e with an abnormal mind

35 Secondly it is in the evidence of P W 8 Ahmad Noor and P W 9 Aleemuddin that at about 9 p m prior to the occurrence the appellant addressed them, Habeeb and Sabir despicably KATUON (Muslims) their end was near Thereupon Sabir and Habeeb got infuriated and Habeeb even picked up a danda to hit him but the witnesses pacified them saying that he was SIRRI and talked nonsense that is he neither understood nor meant what he talked

Thirdly it is in the evidence of P W 10 Kishan that because of his abnormal condition and behaviour he was SIRRI

Fourthly, it is in the evidence of P W 1 Akbar Ali P W 4 Ashfaq Husain and P W 5 Mushtaq Beg that when they found the appellant in the mosque, he was smoking a Biri, warning himself with the fire lit of the torn pieces of Holy Quaran Sharif and other material of the mosque had nonsense of personal safety and did not try to escape but causally stated that it was not mosque but temple of Hari Har, that it was reign of Allab Udal That he offered water in the temple That when he shivered he lit the fire after tearing of the Quran Sharif curtains and Bamboos etc That when the Mulla had hit him twice with a Bamboo he had snatched it and killed the Mulla by wielding blows with the same Bamboo and then placed his body on the fire

Fifthly admittedly in spite of the above happening seeing the torn pieces of Holy Quaran and burnt dead body of the Mulla the appellant was not at all given any thrashing lest he was lynched as normally would have been particularly when subsequently the Muslims of the locality got so much infuriated that rioting took place in spite of the arrival of the district authorities and curfew imposed It singularly indicates that these witnesses and others who had arrived till the appellant was taken to the police station did not touch him as it was in their knowledge that he had an abnormal mind and did not understand what he had done

Sixthly there is evidence of Dr M S Mathur P W 3 that on examination of his mental condition in the District Hospital from 26th April to 5th May 1976 he had found abnormality in him

Seventhly there is testimony of D W 1 Dr A K Agarwal an expert that the various symptoms of the appellant cutting the throat of goat and then trying to make it alive calling himself incarnate of God and after the death of his daughter pouring his blood after cutting his own thigh on the dead body to revive her were symptoms of insanity and the main distinguishing feature in the conduct of a mad man is that his actions are without motive

Lastly it was a motiveless murder The appellant was not at all conscious of his act hence had no sence of his personal safety which he had virtually thrown to winds by remaining there and making no effort to escape In his judicial confession it is further there that though he had first got out of the mosque after committing the act went to the bus stand, took some rest on the back seat of a bus and after sometime he again went inside the mosque and was found warming himself near the fire lit by him after tearing of the Quran Sharif curtains and bomboos of the mosque

36 In any event the totality of the above

evidence before the Court and the cogent facts and circumstances emerging therefrom raise qua the charge against the accused more than reasonable doubt in the mind of the Court The prosecution must hence be held to have failed to bring home to the accused the impugned charge beyond reasonable doubt The inevitable end result would therefore be an order of acquittal The impugned conviction is therefore liable to be quashed

37 However in the context of S 334, Cr P C a finding is here recorded to the effect that the appellant had in fact committed the act of resulting in the death of Mohd Hussain Mulla of the Mosque That this is so stands proved in view of his admission in his confession u/s 164 Cr P C before the Magistrate and corroborated by the fact that he was apprehended on the spot immediately after the incident He has, however, succeeded in getting protection of S 84 I P C

38 In the result the appeal succeeds and is allowed The impugned order of his conviction and sentence recorded by the Sessions Judge in S T No 594 of 1977 is set aside and the appellant is acquitted of the charges under Ss 302 201 and 295 and 295A of the Penal Code

39 This however, is not a case where the appellant can be set free but one wherein an order u/s 335 Cr P C requires to be made He is on bail He shall, therefore, be taken into custody forthwith and examined by a competent doctor regarding his fitness to live in society It shall be open to the Sessions Judge to deliver the appellant to his relative or friend upon application of such relative or friend and on his giving security to the satisfaction of the Sessions Judge that the appellant shall be properly taken care of and prevented from doing injury to himself or any other person, be produced for the inspection of such officer, and at such time and place, as the State Government may direct The Sessions Judge shall report to the State Government the action taken as provided under S 335, Cr P C in case any friend or relation does not come forward and furnishes security as stated above he shall be detained in safe custody wherever provided by the State Government in jail or any particular jail for such prisoners until certified to be mentally fit to live in society

Appeal allowed

1991 ALL L J 600

= 1991 Cri L J 1624

K P SINGH AND
GIRIDHAR MALAVIYA, JJ

Jagdish Prasad and others, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petition No 28041 of 1990, D/ 29 11 90

Criminal P C (2 of 1974), S 482 -- Powers of High Court under -- Theft -- FIR lodged -- FIR disclosing offence -- High Court refused to quash FIR.

The victim was robbed of her belongings and a non cognizable offence was disclosed by the first information report Merely because the first information report was delayed or merely on account of some compromise by which the party had decided not to bring the matter to the notice of the police earlier would not prevent the police to investigate the matter when once it is brought to its notice Moreover, the factum of the occurrence was not disputed Whether the petitioners were a party to the crime or not, could not be decided by the High Court on account of the Panchanama in which only one person was shown to be responsible for the crime Moreover, admittedly in her statement u/s 161, Cr P C the first informant named some of the petitioners and said that those petitioners and others had joined hands in robbing her of her belongings Under the circumstances, since the perusal of the FIR discloses the offence High Court refused to quash the first information report.

CI/DI/A200/91/VSM

Cases Referred	Chronological	Paras
1989 Cri LJ 1013	1989 All Cri C 181	7
1982 Cri LJ 819	AIR 1982 SC 949	8, 9, 11, 19
1974 Cri LJ 802	AIR 1974 SC 1146	11
1970 Cri LJ 764	AIR 1970 SC 786 1970 All LJ 1348	11
1960 Cri LJ 1239	AIR 1960 SC 866	11
1946 Cri LJ 413	AIR 1945 PC 18 1945 All LJ 47	11

Sri V P Srivastava Advocate for Petitioners S C for Respondents

GIRIDHAR MALAVIYA, J — Jagdish Prasad and seven others have filed this petition with the prayer to quash the First Information report dated 22-9 90 giving rise to crime No 435 of 1990 under Ss 457 and 380, IPC Police Station Shahganj District Agra. An application has been simultaneously made seeking stay of the arrest of the applicants in the said crime

2 The allegation in the FIR lodged by one Smt Chameli Devi on 22 9 90 was that on the night between 16/17th April 1990 her relations had stolen Rs 36000/ two pairs of silver Payal weighing 18 Tola and a golden ring weighing 1 Tola after breaking open the lock of her box It was mentioned in the FIR that the details of this incident had been mentioned in a report given by her in the office of the Dy S P Agra on 27 7 90 requesting the police to get the case registered and to take necessary action Consequently the informant while annexing the copy of the said report dated 27 7 90 had requested the police to take necessary action in the matter This report is Annexure-2 to the writ petition

3 In the petition the petitioners have given the pedigree, according to which the first informant Smt Chameli Devi was aunt (Bua) of the father of the petitioner No 4 Dharmendra Nath The rest of the petitioners are admittedly the relations of Dharmendra Nath It is not disputed that Smt. Chameli Devi had come and stayed with Smt Jai Devi at 10-/131 A Kolihai P S Shahganj, District Agra when she complained about the loss of her ornaments and cash etc Admittedly the petitioners Nos 1 to 6 are living in one and the same house i e house No 10 131 A Kolihai, P S Shahganj, District Agra It is further asserted in the petition that on her complaint some persons intervened in the matter Thereafter it was agreed that the family members of the petitioners would pay the compensation of Rs 20 000/ to Smt Chameli Devi. Consequently it is alleged that a Panchnama was prepared on 16 5 90 evidencing the compromise This compromise (Panchanama) which was entered in between Smt Chameli Devi and Ravendra Nath alias Teepu son of Gangeshwar Nath Saxena second party in the Panchanama, who was the brother of Dharmendra Nath petitioner No 4, is Annexure 1 to the writ petition A perusal of this Panchnama clearly mentioned that the second party on 16-4-90 had taken away Rs 16000/, two pairs of silver Payal and a golden ring and as the second party had paid back Rs 12,000/ and had agreed to pay Rs 8 000/ within a year, hence no action would he taken by either party in respect of the said incident in future and even if some action was taken the same would be treated to be illegal

4 It appears that when the case was registered on the basis of the FIR Annexure-2, the police investigated the matter interrogated the first informant and on the basis of the statement of the first informant in which she alleged that although she had not seen any person taking away her belongings yet she suspected that Dharmendra Nath, Ravendra Nath, Tapeshwar Nath etc had conspired and robbed of her belongings, the police wanted to apprehend the petitioners In this background the petitioners have come to this court with the prayer for quashing of the First information report against the petitioners

5 The learned counsel for the petitioners has contended that since the compromise itself clearly mentions that only Ravindra Nath had taken the belongings of the first informant, hence the first information report should be quashed as against the present

petitioners inasmuch as neither the first information report nor the compromise (Panchnama) made out any case against the rest of the petitioners

6 We have heard the learned counsel for the petitioners as also the learned Additional Govt Advocate on this issue at the stage of admission of the petition itself

7 The learned Addl Govt Advocate relied upon a seven Judges Full Bench judgment of this Court in the case of Ram Lal Yadav v State of U P reported in 1989 Allahabad Criminal Cases 181 (1989 Cri LJ 1013) According to the learned Additional Govt Advocate if the reading of the first information report discloses an offences the Court cannot interfere in the statutory right of the police to investigate into the said crime

8 However learned counsel for the petitioners contends that the aforesaid Full Bench judgment in the case of Ram Lal Yadav was considering the question whether the High Court had inherent powers u/s 482 Cr P C to interfere with the investigation by the police or not and whether the High Court in its inherent powers could stay the arrest of the accused during investigation Learned counsel for the petitioners further contends that in any case the said Full Bench had categorically mentioned that if the power of investigation is exercised by a police officer mala fide the High Court can quash the investigation under Art 226 of the Constitution Learned counsel for the petitioners has further contended that the Supreme Court in the case of State of West Bengal v Swapan Kumar Guha reported in AIR 1982 SC 949 (1982 Cri LJ 819) had categorically observed in para 64 of the judgment that a person against whom no offence is disclosed cannot be put to any harassment by the process of investigation which is likely to put his personal liberty and also property which are considered sacred and sacrosanct into peril and jeopardy

9 According to the learned counsel for the petitioners the compromise (panchnama) was the positive proof that the petitioners were not responsible for the crime of theft and as such in view of the aforesaid observations of Supreme Court in the case of State of West Bengal v Swapan Kumar Guha (AIR 1982 SC 949) the first information report against the petitioners as also the investigation which was being conducted in the said case against the petitioner deserved to be quashed

10 The question which, therefore has to be considered is whether in such cases where the first information report disclosed the commission of an offence is it permissible that a Court may interfere in the statutory right of the police to investigate the said crime The next question would be whether the court should at that stage look into the evidence which a part wants the Court to examine in its defence and to come to a conclusion whether or not the said person is involved in the said crime or not

11 By a series of the judgments by the Privy Council and the Supreme Court it is not absolutely settled that the Courts do not interfere in the statutory right of the police to investigate the matter where the first information report discloses the commission of a cognizable offence It is not necessary to quote all these cases in this judgment However as the learned counsel has placed reliance on the case of State of West Bengal v Swapan Kumar Guha (supra) it appears desirable to look into that case to answer the question which has been raised before us in the present petition In the case of Swapan Kumar Guha the Firm Sanchaita Investments and others represented by its three Directors was alleged to have contravened the provisions of S 3 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 The First and its two partners had filed a writ petition in the High Court challenging the validity of the FIR and the proceedings arising out of the same The High Court allowed the petition and quashed the first information report The said order of the High Court was challenged in the Supreme Court by the State of West Bengal Considering the arguments

Hon A N Sen J in para 64 of the judgment held as follows

64 In my opinion the legal position is well settled The legal position appears to be that if an offence is disclosed the court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed if however the materials do not disclose an offence no investigation should normally be permitted. The observations of the Judicial Committee and the observations of this Court in the various decisions which I have earlier quoted make this position abundantly clear The propositions enunicated by the Judicial Committee and this Court in the various decisions which I have earlier noted, are based on sound principles of justice Once an offence is disclosed an investigation into the offence must necessarily follow in the interests of justice If however no offence is disclosed as investigation cannot be permitted as any investigation in the absence of any offence being disclosed will result in unnecessary harassment to a party whose liberty and property may be put to jeopardy for nothing The liberty and property of any individual are sacred and sacrosanct and the Court zealously guards them and protects them An investigation is carried on for the purpose of gathering necessary materials for establishing and proving an offence which is disclosed When an offence is disclosed, a proper investigation in the interest of justice becomes necessary to collect materials for establishing the offence and for bringing the offender to book In the absence of a proper investigation in a case where an offence is disclosed, the offender may succeed in escaping from the consequences and the offender may go unpunished to the detriment of the cause of justice and the society at large Justice requires that a person who commits an offence has to be brought to book and must be punished for the same If the Court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of the justice suffers It is on the basis of this principle that the Court normally does not interfere with the investigation of a case where an offence has been disclosed The decisions on which Mr Chaterjee has relied are based on this sound principle and in all these cases an offence had been disclosed. Relying on the well settled and sound principle that the court should not interfere with an investigation into an offence at the stage of investigation and should allow the investigation to be completed, this court had made the observations in the said decisions which I have earlier quoted reiterating and reaffirming the sound principles of justice The decisions relied on by Mr Chatterjee do not lay down as it cannot possibly be laid down as a broad proposition of law that an investigation must necessarily be permitted to continue and will not be prevented by the Court at the stage of investigation, even if no offence is disclosed While adverting to this specific question as to whether an investigation can go on even if no offence is disclosed the Judicial Committee in the case of King Emperor v Khwaja Nazir Ahmad AIR 1945 PC 18 (1946 Cri LJ 413) (supra) and this Court in R P Kapur v State of Punjab AIR 1960 SC 866 (1960 Cri LJ 1239) (supra) Jehan Singh v Delhi Administration AIR 1974 SC 1146 (1974 Cri LJ 1146) (supra) S N Sharma v Bipen Kumar Tiwari AIR 1970 SC 786 (1970 Cri LJ 786) (supra) have clearly laid down that no investigation can be permitted and have made the observations which I have earlier quoted and which were relied on by Mr Sen As I have earlier observed this proposition is not only based on sound logic but is also based on fundamental principles of justice as a person against whom no offence is disclosed cannot be put to any harassment by the process of investigation which is likely to put his personal liberty and also property which are considered sacred and sacrosanct into peril and jeopardy

12 The learned counsel for the petitioners on the basis of the observations in the said passage underlined by us says that in every matter where a person comes to the High Court and claims that the FIR does not disclose any offence against him or where he can bring to the notice of the High Court the matter which may also demonstrate that no offence is made out against him in connection with the said crime, should not be permitted to face the ignominy of investigation in a criminal case against him in proper case this court should always look into the matter and quash the first information report against the person approaching the High Court According to the learned counsel there may be a person who might have been present at a place so far away at the time of the alleged commission of the offence for which there may be a positive documentary evidence available to disprove any allegation that he had participated in the said crime The learned counsel contends that if such a person despite a positive evidence of the nature is asked to face the ignominy of investigation by being arrested etc , it is bound to result in unnecessary harassment by the process of investigation, which according to the learned counsel, is so categorically deprecated by the Supreme Court in its judgment quoted above

13 We are of the view that the learned counsel has not correctly appreciated the observation of the Supreme Court in the case of Swapan Kumar Guha While it is true that the Supreme Court mentioned the fact that a person against whom no offence is disclosed, could not be put to harassment by the process of investigation, reading the entire judgment as a whole alongwith other judgments quoted by him earlier, leave no room to doubt that the expression person was used in the said passage to mean that if the first information report itself did not disclose any offence, then any person named or not in the said first information report could not be required to face the investigation

14 We have to examine this matter from yet another angle In most of the cases of dacoity no person is named as an accused If it was to be held that since the offence was not disclosed against any person in the first information report, no person could consequently be challenged or prosecuted That would lead to a chaos and would be the travesty of justice Similarly there are cases where a dead body is recovered with evidence of unnatural death with the result that the matter is reported to the police about the crime and one unnamed first information report is then registered There are yet other type of cases where a person after committing the murder himself reports to the police about the commission of the murder by alleging sometime about a dacoity or even by asserting that when he happened to reach the place, he had found the crime completed In all such cases no person is mentioned as an accused in the FIR Can it be suggested that in all these cases although crime had taken place, yet since in the first information report the offence was not disclosed against any person, the investigation should not proceed and the guilty person could never be brought to book? The answer has to be that in such offences where a person was nominated in the FIR or not, the matter had to be investigated and the guilty person had to be brought to book, despite the fact that no offence had been disclosed against any person

15 We are aware of the fact that there is also a tendency prevailing in our country whereby due to enmity or other reasons there are cases in which some persons are falsely nominated, both at the stage of the first information report as also at the stage of investigation Taking the example cited by the learned counsel for the petitioners in which a person had a perfect alibi in the form of positive documentary evidence at a remote far away place from the place where the crime was committed, we still have to see whether it would be proper for the Court to interfere in such case at the stage of investigation itself and to come to a conclusion, whether or not such person was involved in the crime or not We have given our anxious consideration to this aspect of the matter and are of the view that even in such cases it is not open for the Court to quash the first information report against such person, or even to stay his arrest in such matters We give reason of our aforesaid conclusion hereafter

The scheme of investigation as set out in

Chapter XII of the Code of Criminal Procedure, 1973 contemplates the investigation when an information is received regarding the commission of an offence Section 169 of the Code of Criminal Procedure reads as follows —

If, upon an investigation under this Chapter, it appears to the Officer in charge of the police station that there is not sufficient evidence or reasonable ground of suspension to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him to his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or commit him for trial "

16 This means that the Investigating Officer in such cases arrived at the conclusion that the person against whom the offence was alleged was not involved in the crime and therefore, should not be tried for the said offence If upon a plea of alibi, or any other defence plea the Investigating Officer is prevented to investigate a crime which otherwise disclosed an offence there could be two possibilities Firstly if the matter is not investigated by the police it will never be possible for the Investigating Officer to give a clean chit to an innocent person, who may be falsely nominated or involved in a criminal case Secondly there may be cases where some person may set up a false alibi It cannot be the function of this court in its jurisdiction under Art 226 of the Constitution to examine whether the alibi so set up by the person is genuine or not It is not unknown that there have been cases of conspiracy where the crime motivator got himself landed in jail after committing some petty crime and then got some heineous crime such as a murder, committed through his men There have been allegations that sometime an accused by bribing the jail authorities came out of the jail to commit a heinous crime and then went back to jail to plead later than he was all along in jail when the crime was committed Therefore a plea of alibi, for whatever worth it may be has to be investigated by the Investigating Officer. and this court would not embark upon any such enquiry in a case where the first information report discloses the commission of a cognizable offence to find whether some person was actually involved in that case or not This is the function purely entrusted to the Investigating Officer of Police and the court will not assume the jurisdiction of the Investigating Officer to arrive at a conclusion and to give a finding which normally a police officer is supposed to give in terms of Section 169 of the Code of Criminal Procedure

17 However, the learned counsel for the petitioners contends that this approach of non-inference by the Court is bound to cause serious prejudice to such person where the person may be falsely implicated despite the fact that he was really not involved in the crime and had a real perfect alibi inasmuch as even in such cases, also he would be arrested and would have to face an illegal and unjustified prosecution after being arrested in the said case It is not, that there is no remedy available to such a person Once a person feels that he is being wrongly implicated in a case he can alway surrender and apply for bail Except in the State of Uttar Pradesh, in other States such a person has a right even to make an application for anticipatory bail In either case it is open for such a person apprehending his arrest to tell the Court that on the facts and circumstances disclosed by him in his bail application, he was entitled to bail forthwith Thus there is a provision for the intervention by a Court during the pendency of the investigation to look into the matter and in a suitable case grant bail to the person whose liberty has been threatened

18 However, learned counsel for the petitioners contends that this remedy of getting the bail is not the appropriate alternative remedy In this respect his contention was twofold The first contention is that if the person had not committed any crime, why should he be even required to go to courts of law and ask for bail His second contention is that the process of bail these days has become such that it takes a long time for a person to get his bail application decided with the result that even in such case where the Court ultimately comes to a conclusion that the applicant was prima facie falsely implicated and should be granted bail, yet he languishes in jail for quite some time In the first place if the petitioner comes to this Court asserting that no offence is disclosed against him hence he is entitled to a relief, we see no reason why he could not go to the district courts to ask for bail So far as the question of time in the disposal of the bail application is concerned, here again we find that even in the High Court it is not possible to grant a relief immediately to a person as soon as he moves the petition The learned counsel contends that in a suitable case a person can get an interim order from the High Court staying his arrest during the pendency of the writ petition Apart from the fact that a Full Bench of this High Court has categorically said that the arrest can be stayed by the High Court only in such cases where the FIR itself does not disclose the commission of any offence, it will be a wrong practice to grant an ex parte stay by the High Court in the cases where the FIR discloses the commission of a serious nature of a cognizable offence Moreover this court has time and again directed by their order and judgment that the trial court should attach utmost importance in the disposal of the bail application and should, as far as possible, dispose of the bail applications which are moved before them, on the same day The difficulty arises where the State counsel does not have the relevant materials for opposing the bail application by placing full facts before the Court as it cannot be expected that in every case the prosecuting officer should be possessed with the entire materials relating to criminal cases available with him However, in a case of exceptional nature where the applicant can demonstrate to the satisfaction of the Court concerned that he has a prima facie case of his false implication and of undue harassment by producing the documentary evidence to that effect the Court considering the bail application can direct the release of such person for a couple of days on his executing a personal bond by asking the prosecution to get instructions in the said matter by the time when the court takes up the case again Therefore it is not right on the part of the learned counsel for the petitioners to contend that if this court does not interfere in such matters, the innocent person is bound to face undue harassment Moreover, wherever a system is evolved for protection of society to secure peace and harmony If sometime some individual has to face a slight discomfiture in view of the fact that the person concerned has ultimately to approach some courts of law the system itself cannot be given up

19 The learned counsel for the petitioners also argued that the view taken by us would not leave any case to be brought to the High Court as every first information report will necessarily disclose some offence The contention of the learned counsel is not correct Very often we come across the cases where we find that in view of the amendments notified some particular action which has been considered as an offence had ceased to be an offence on the said date In such cases notice is always issued by the High Court and the arrest of the petitioner is stayed Similarly sometime we find some complaints and a perusal of the complaint demonstrates that no offence is disclosed from the facts alleged therein The High Court interferes One such case was apparently before the High Court and the Supreme Court in the case of State of West Bengal v *Swapan Kumar Guha* (supra) Hence the learned counsel for the petitioners is not correct in his assertion that the view which we are taking, is going to render the remedy of non existent for every purpose and for all the time to come

20 Coming to the facts of the instant case we find that admittedly the victim had been robbed of her belongings Hence a non cognizable offence was disclosed by the first information report Merely because the first information report was delayed or merely on

account of some compromise by which the party had decided not to bring the matter to the notice of the police earlier, would not prevent the police to investigate the matter when once it is brought to its notice Moreover the factum of the occurrence is not disputed Whether the petitioners were a party to the crime or not cannot be decided by us merely on account of the Panchanama in which only one person was shown to be responsible for the crime Moreover admittedly in her statement under S 161 Cr P C the first informant named some of the petitioners and said that those petitioners and others had joined hands in robbing her of her belongings Under the circumstances since the perusal of the FIR discloses the offence this Court would not be justified in quashing the first information report of this case In this connection we would also like to add that it is not possible to split any first information report If the first information report discloses an offence it has to be investigated To suggest that a first information report can be quashed against some persons and the investigation would be directed not to be continued against some persons, could be against the settled norms that the police must have free hand to investigate the matter The only remedy which is available to the persons in this regard is to make an application for bail before the appropriate court, which is bound to look into the facts alleged therein and if satisfied can direct the person to be released on bail Once a person has been released, he has then to bring the facts proving his innocence to the notice of the I.P and then wait for his report It is possible that the I O may agree and submit a report under S 169, Cr P C in favour of such person which in common term is being known as a final report There may still be cases where a person may not be satisfied with the conclusion of the I P In that event after a charge-sheet is submitted and the person is summoned, it is again open for that person to contend before the summoning court or the trial court at the stage of framing of the charge, that on the evidence collected by the I.O he is entitled to discharge All these safeguards have been carefully set out in the Code of Criminal Procedure and it is not possible for this Court in its jurisdiction under Art 226 of the Constitution to exercise those jurisdictions and to investigate into the questions of fact which can be done only by the courts mentioned hereinbefore

21 The result is that the petitioners have failed to make out any case for interference by this court This writ petition is accordingly dismissed at the stage of admission

Petition dismissed

1991 ALL L J 607

= 1991 Cri L J 1805

G D DUBE, J

Nagar Swasth Adhikari Nagar Mahapalika, Agra Appellant v Ram Ratan Respondent

C A No 998 of 1979 D/- 11-12-1990 *

—Prevention of Food Adulteration Act (37 of 1954), S 11 — Taking of samples — Procedure — Container used for measurement dipped thrice in can containing oil to fill the sample phials — Procedure adopted would not affect sample representing whole lot — Acquittal for no proper compliance of S 11, not justified

1976 All India Prevention of Food Adulteration Journal 82, Dissented from

1985 (1) Prevention of Food Adulteration Cases 38, 1979 Prevention of Food Adulteration Cases 319, Rel on (Para 6)

Cases Referred Chronological	Paras
1985 All LJ 165 (1985) 1 FAC 36	5
1979 All LJ 278 (1979) 1 FAC 319	4
1979 FAC 69 1976 FAJ 81	4

Mr B N Upadhya, for Appellant, S C , for Respondent

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*Against the judgment and order passed by Sri A U Khan, Addl Chief Judicial Magistrate, Agra, D/- 29-11-1977

JUDGMENT — This appeal has been preferred against the judgment and order of the Additional Chief Judicial Magistrate, Agra, acquitting the appellant of the charge under S 7/16 of Prevention of Food Adulteration Act (hereinafter referred to as the Act)

2 The list has been revised None has appeared for the respondent

3 Sample of Linseed Oil was allegedly taken from the respondent's possession The evidence of the Food Inspector was that one container for measurement was dipped thrice in the can containing the oil and the sample phials were filled The learned Magistrate came to the conclusion that this was not a proper compliance of S 11 of the Act Consequently, he acquitted the appellant of the aforesaid charge

4 Learned counsel for Nagar Swastha Adhikari (appellant) has cited a case in Bankey v State, 1979 Prevention of Food Adulteration cases 319 It was urged that as long as the sample is taken by taking out the sample three times from the same container, then it amounts to substantial compliance of S 11 of the Act In this the above case law Babu Lal v State, 1976 All India Prevention of Food Adulteration Cases 69 relied upon by the lower Court was discussed The Hon'ble single Judge of this Court did not agree with the observation of the Madhya Pradesh High Court in Babu Lal's case (supra) Hon'ble P N Buxi, J had discussed several case laws of various High Courts and had come to the conclusion that if the sample is taken out by taking the sample each time from the same container, then that does not make any difference

5 Learned counsel for the appellant has also cited a case in Nagar Swastha Adhikari, Nagar Mahapalika v Sri Nath, 1985 (1) Prevention of Food Adulteration Cases 36 In this case, the Food Inspector had taken the sample in three instalments in three different phials In this case, there was a single can of milk from which all the three samples were taken in three instalments Hon'ble V P Mathur, J had observed that this does not affect the sample representing the whole lot The procedure adopted by the Food Inspector was held to be a sufficient compliance of S 11 of the Act

6 In view of what has been said above, I find that the view of this Court is contrary to the view of Babu Lal's case (supra) The procedure adopted by the Food Inspector did not affect the sample representing the whole lot of oil The ground, on which the acquittal was recorded, was not sound

7 No other point has been pressed

8 The appeal is allowed The judgment of the lower Court is set aside The case is sent back to the lower Court for redetermination of entire matter afresh However, the learned Magistrate shall not allow fresh evidence The case shall be disposed of after hearing both he parties The learned Magistrate may take steps for securing attendance of the accused respondent

Appeal allowed

1991 ALL L J 608

= 1981 CRI L J 1806

G D DUBE, J

Jarawar Singh and others, Appellants v The State, Respondent

C A No 515 of 1979, D/- 11-12-1990 *

Penal Code (1860), Ss 399, 402 — Dacoity — Conviction for — Out of five accused, one preferring separate appeal and other four preferring joint appeal — Both appeals not connected due to official error — Observations of Court allowing separate appeal holding that assembly of appellants for purposes of committing dacoity at alleged place, date, time was not established should be binding —Principle of stare decisis applicable — All accused to be acquitted (Para 4)

Mr S P Singh Roghav, for Appellants, A G A , for Respondent

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* Against the judgment and order of Shri J N Bansal, Ist Addl S J , Bulandshahr, D/- 2-2-1979

JUDGMENT — This appeal has arisen against the judgment and order of First Additional Sessions Judge, Bulandshahr, holding the appellants guilty of the offences punishable u/Ss 399 and 402 IPC Along with these appellants one Man Singh was also convicted and sentenced of the offences u/Ss 399 and 402, IPC He was also sentenced to one year's R I u/S 25 Arms Act It transpires that all the five accused were tried in respect of an offence allegedly committed between 31st July and Ist of August 1974 in the Dharamshala There were five sessions trials The convicted accused Man Singh had preferred Criminal Appeal No 543 of 1979 The remaining had preferred present Criminal Appeal No 515 of 1979

2 It appears that Criminal Appeal No 543 of 1979 was heard by Hon'ble O P Mehrotra J By his judgment dated 11-12-1986 Hon'ble Mehrotra, J had allowed the appeal and set aside the conviction and sentence of appellant Man Singh Hon'ble Mehrotra, J had not believed the prosecution story and also held that the whole prosecution story was concocted The evidence of the Police Officer produced by the prosecution was not at all believed Consequently, Criminal Appeal No 543 of 1979 had been allowed The Office has reported that on account of error committed by an official of this Court who has now retired, this appeal could not be connected with Criminal Appeal No 543 of 1979

3 Even though the list has been revised, none has appeared for the appellants I have heard learned A G A

4 The principle of stare-decisis applies in this matter The observations of Hon'ble O P Mehrotra, J are binding in this case also It is held that the fact regarding assembly of the appellants for the purposes of committing dacoity at the alleged date, time and place was not established

5 In the result, the appeal succeeds and is allowed The judgment of the lower Court is set aside The appellants are acquitted for charges levelled against them They are on bail They need not surrender Their bail bonds are cancelled and sureties discharged

Appeal allowed

1991 ALL L J 609

= 1991 Cri L J 360

(SUPREME COURT)

(From Allahabad)

S RATNAVEL PANDIAN AND K JAYACHANDRA REDDY, JJ

Criminal Appeal No 72 of 1986, D/- 7-9-1990

Vinod Kumar, Appellant v State of U P Respondent

Penal Code (1860), S 300 — Charge of murder Interested witnesses — Credibility — Witnesses, brother and servant of deceased on farm where occurrence took place — Brother, handing over weapon of offence to police station at earliest point of time and lodging written report mentioning servant as witness to occurrence — Victim himself mentioning both as witnesses to occurrence in dying declaration — Evidence of both corroborated by medical and circumstantial evidence — Credibility of testimony neither impaired nor successfully impeached — No impediment in accepting their testimony (Paras 30 to 35)

S RATNAVEL PANDIAN, J — This appeal by special leave is directed against the judgment of the High Court at Allahabad Lucknow Bench rendered in Criminal Appeal No 821/78 dismissing the appeal preferred by the appellant and confirming the judgment of the trial Court, whereunder the appellant stood convicted u/S 302, IPC and also u/S 27 of the Arms Act and sentenced to imprisonment for life and 5 years rigorous imprisonment respectively

2 The appellant, Vinod Kumar took his trial along with one Anil Kumar (since acquitted) on the charge that on 20-11-1977 at about 3-30 p m in the field of Vishwa Nath Kapoor

situated in the village Makanpur within the limits of Palia Police Station, he caused the death of the deceased Raj Kumar by shooting him with a double barrel breach loading gun (DBBL Gun No 7075), the licence for which stood in the name of his mother The charge against the acquitted accused was u/S 302 read with S 34, IPC for having shared the intention of the appellant in committing the murder of Raj Kumar

3 The facts of the case leading to the prosecution are set out in great details in the judgment of the trial Court Nevertheless, we think it necessary to recapitulate the following salient and material facts in order to give our own reasons for the conclusions which we will be arriving at

4 There were two affluent and influential families in Makanpur Palia locality, of which one family was of Vishwa Nath Kapoor, consisting of four brothers including Satish Kumar (P W 1) and Raj Kumar Kapoor (the deceased herein) There father was one Lala Charan of Makanpur who developed an agricultural farm extending to an area of 150 acres All the brothers were residing under a common roof, having common mess and doing cultivation The other family was that of one Sharda Prasad who was murdered about 17 or 18 years ago and who is survived by his wife, Bhagwati Devi and his two sons, i e the appellant Vinod Kumar and another by name Bhagwan The said Sharda Prasad was also owning a big farm extending to an area of 65-70 acres and a farm house After his death, his wife and sons were looking after the cultivation of the lands residing in the farm house

5 The distance between Makanpur and Palia is about a mile The relationship between the two families was cordial before the murder of Sharda Prasad Later on, a dispute arose in respect of the enjoyment of one acre of land which adjoins the farm land of the appellant The appellant and his brother filed a civil suit against P W 1 and his brothers and the same was pending before the consolidation authorities at the relevant time of the occurrence, the hearing of which stood posted to 21-11-79 As there was breach of peace in respect of the enjoyment of the disputed property, a proceeding u/S 145 of the Code of Criminal Procedure was initiated on an application moved by the appellant and his brother and the disputed land was attached Besides a security proceeding u/S 107 of the Code of Criminal Procedure was also initiated against the members of the two families About 3 days prior to the occurrence i e on 17-11-1977, Vishwa Nath Kapoor (P W 6) the brother of the deceased was threatened by Bhagwan and one Prem Singh in respect of which Vishwa Nath Kapoor (P W 6) lodged a criminal complaint

6 The occurrence took place on 20-11-1977 at about 3-30 p m By about that time, while P W 1 along with his servant, P W 3 was doing agricultural operation in his farm field which is at a distance of about a furlong from his family farm house, the deceased Raj Kumar was coming by the road running near the field, riding his cycle The appellant came by that way driving his jeep The acquitted Anil Kumar was sitting on the right side of the jeep as the jeep was one of left hand drive On noticing the jeep coming at a distance of 20 paces, the deceased parked his cycle and got down into the field evidently to give way to the jeep The field was at a lower level from the level of the road On seeing the deceased, the appellant stopped the jeep got down with the gun and challenged the deceased, threatening "Bastard, where will you go now?" So saying he moved towards the deceased whilst the latter stood facing the appellant Suddenly, the appellant fired a shot at the deceased who on receipt of the gun-shot injury fell down The appellant successively fired a second shot but the aim was lost P Ws 1 and 3 who were in the field near the scene rushed towards the sence spot The deceased, presumably apprehending further attack suddenly got up and snatched away the gun from the hands of the appellant The accused on noticing P Ws 1 and 3 rushing to the scene and on being taken aback by the sudden snatching away of the weapon from his possession got into the jeep along with Anil Kumar and made good his escape by driving the jeep

7 P Ws 1 and 3 came near the injured Raj Kumar and found him bleeding The deceased handed over the gun to P W 1 The members of the deceased family were informed about the occurrence Vishwa Nath Kapoor (P W 6) and Mihi Lal brought a cot in a tractor attached with a trolly The deceased Raj Kumar was alive So the witnesses after placing the injured in the tractor removed him to Palia Hospital P W 1 prepared a report Ext Ka 1 and went to the police station taking the gun (Ext 1) containing two fired cartridges (Ext 2) and lodged Ext Ka 1 at 4-30 p m The police station is at a distance of two miles from the place of occurrence P W 9 a constable clerk received Ext Ka-1 at 4-30 p m and registered a case u/Ss 307 and 307 read with S 109, IPC The Sub-Inspector of Police (P W 11) took up the investigation

8 P W 11 realising the necessity of immediately obtaining a dying declaration from the victim Raj Kumar telephonically contacted the Principal of Baldeo Vidia Intermediate College, by name Raj Kumar Dixit and requested him to proceed to the Primary Health Centre for recording a dying declaration from the injured Raj Kumar By then, a lecturer of the same college, by name Ram Kumar Trivedi (P W 5) had arrived there on hearing about the occurrence At the request of Mr Dixit, P W 5 recorded Ext Ka 11, the dying declaration of the deceased When the Sub-Inspector reached the Primary Health Centre at about 5 05 p m the injured had already been taken to the operation theatre where the Medical Officer Ratan Singh (P W 2) started recording another dying declaration of the deceased Even before the dying declaration was completed, the deceased expired at about 5-30 p m

9 On receipt of the information of Raj Kumar's death, the investigating officer directed P W 9 to go to the police station and get the case altered into one of murder u/S 302, IPC Then, he held inquest over the dead body of the deceased and gave a requisition to the Medical Officer to conduct necropsy on the dead body The statements of the witnesses of P Ws 6 and others were recorded The appellant was absconding However, the investigating officer found the jeep involved in the occurrence having been parked outside the house of the appellant He seized, the jeep On the next day, he inspected the scene of occurrence and prepared a rough sketch Ex Ka 34 He noticed blood-stains at point 'A marked in the site plan wherefrom he took sample of blood-stained earth The scene was in the field of Vishwa Nath Kapoor P W 6 He recorded the statement of the eye-witness i e P W 3 He again searched for the appellant on the 22nd, but could not trace him Therefore, he submitted a report for taking action against appellant and Anil Kumar u/S 82/83 of the Code of Criminal Procedure

10 On 4-12-1977 P W 11 arrested the appellant and Anil Kumar and examined them After completing the investigation, P W 11 laid the charge-sheet against the appellant and Anil Kumar on 27-12-1977

11 The prosecution examined as many as 11 witnesses including the official witnesses and filed a number of documents The appellant when questioned u/S 313 of the Code of Criminal Procedure has given a statement to the effect that on the fateful day, he was going to his farm in his jeep in which his mother was sitting on the rear seat, that he had kept a double barrel gun (Ex I) with him in the front seat behind his back, that when he arrived near a culvert he found a bullock cart fully loaded coming on the opposite side that he stopped the jeep on the road which was narrow, that when he was waiting for the bullock-cart to pass through, the deceased came near his jeep, threatening him and attempted to pick up the gun He has further stated that he, apprehending danger, caught hold of the but of the gun whilst the barrel of the gun was in the hands of the deceased, that while the deceased tried to snatch away the gun violently a shot went off by accident causing a gun-shot injury on the chest of the deceased, that he, getting panicky on account of this unexpected incident, left the scene leaving the gun in the hands of the deceased

who fell down in the field He has added that the dying declaration was falsely concocted by P W 11 in collusion with the Principal of the College The acquitted Anil Kumar stated that he had been falsely implicated in this case

12 The learned Sessions Judge accepting the ocular testimony of P Ws 1 and 3, placing reliance on the two dying declarations Ext Ka-11 and Ext Ka-3 recorded by P Ws 5 and 2 respectively and rejecting the plea of the appellant held

"It was not a case of accidental fire as alleged by the defence, but was a case of deliberate act of firing by the appellant Vinod Kumar at the deceased Raj Kumar "

and consequently convicted and sentenced the appellant under both the charges as aforementioned and acquitted Anil Kumar The appellant preferred an appeal before the High Court which after examining the evidence in extenso has rendered its impugned judgment, agreeing with the findings of the trial Court and dismissing the appeal as devoid of any merit Hence this appeal

13 Mr Lalit, senior counsel appearing on behalf of the appellant took us very meticulously through the recorded evidence and strenuously contended that the facts and attending circumstances of the case go fully in support of the defence that the deceased received the injury accidentally while the deceased and the appellant were pulling the gun, the former holding the barrel and the latter holding the butt in an effort to get the gun and that the two dying declarations Exts Ka-3 and Ka-11 said to have been recorded by P Ws 2 and 5 respectively are clouded with grave suspicion and as such these incredulous documents ought not to have been relied upon for recording the conviction According to him, as the evidence of P Ws 1 and 3 is not only highly interested but also irreconcilably in conflict with the medical evidence, it should be rejected in toto as unworthy of acceptance

14 Before adverting to the argument advanced by Mr Lalit, we shall give a brief preface on the basis of the incontrovertible facts

15 The occurrence took place on 20-11 1977 at about 3-30 p m in the field of P W 6 The appellant came driving his jeep on the road running near the field of P W 6 and met the deceased who was standing by the side of the road in the nearby field The appellant during the incident in question was possessed with a DBBL gun (Ext 1) the licence of which stood in the name of his mother This gun, carried by the appellant in the jeep, was the weapon of offence The gun-shot injury received by the deceased on his chest was due to the hitting of pellets which went off from Ext 1 Leave apart the question whether he received the injury accidentally or otherwise the fact remains that the deceased succumbed to that injury on the same day

16 In the background of the above indisputable facts, we shall now examine the defence contentions seriatim The first submission is with regard to the hotly debated controversial question as to whether the firing of the shot was homicidal or accidental The specific plea of the appellant is that the deceased violently attempted to snatch away the gun already loaded with cartridges by holding the barrel against his chest from the grip of the appellant who was holding the butt and in the process of pulling, one shot accidentally went off hitting on the chest of the deceased Contrary to the above defence theory, the prosecution puts forth its version stating that while the deceased was standing in the field which was in a lower level from the road, the appellant got down from the jeep, moved towards the deceased, obviously with a spirit "come what may" and fired a shot aiming at his chest which within two hours proved fatal, that the aim of the second shot was missed, that the injured Raj Kumar suddenly got up and snatched the weapon out of the hands of the appellant and fell down in the field and that the appellant on seeing P Ws 1 and 3 rushing to the scene spot and on being taken aback on the deceased suddenly snatching away the gun from his hands left the scene abruptly driving his jeep Though prima facie the defence theory seems to be somewhat appealing, when deeply examined in the light of the established facts, the said theory is proved to be a palpably false and invented story

17 The eye-witnesses i e P Ws 1 and 3 are giving a graphic version about the occurrence, the gist of which is that the appellant got down from the jeep with the double barrel gun without switching off the engine of the jeep, moved towards Raj Kumar who was facing the appellant slightly leaning towards west and suddenly fired a shot at Raj Kumar who on receiving the gun-shot wound fell down, that the appellant not being satisfied with that shot in quick succession fired a second shot but the aim was missed, that the deceased suddenly pounced upon the appellant and snatched away the gun from his hands and thereafter the appellant made good his escape by driving his jeep leaving the gun in the hands of the, deceased Besides the testimony of P Ws 1 and 3 there are two dying declarations Ext Ka-3 and Ext Ka-11 in which the deceased had consistently stated that he received the injuries at about 3-30 p m on that day at the hands of the appellant He could not mention the nature of the weapon used by the appellant in Ext Ka-3 since his condition became serious and was unable to speak thereafter when questioned about it Nevertheless in Ext Ka-11 he had unambiguously and clearly stated that the appellant fired the first shot at him by using his gun and the aim of the second shot was missed and that he snatched the gun out of the hands of the appellant Thus against the unsubstantiated defence version we have got the oral as well as the unimpeachable documentary evidence

18 The version of the prosecution in addition to the above ocular testimony and dying declarations is amply supported by the evidence of other witnesses and the impelling circumstances Firstly the injured Raj Kumar did not die instantaneously at the spot but died at about 5-30 p m in the hospital This cannot be doubted because it is the disinterested evidence of P W 2, the Medical Officer that Raj Kumar succumbed to his injuries only in the operation theatre P W 5 has recorded the first dying declaration Ext Ka-11 and he has sworn to the fact that the injured Raj Kumar was in a fit condition to make the dying declaration voluntarily P W 4 who conducted necropsy on the dead body of the deceased though could not give a definite and decisive answer to the question whether the injured Raj Kumar after sustaining the injury could have been alive and snatched the weapon, at one point of time he would assert that the injured could have suddenly jumped and snatched the weapon before he suffered heavy loss of blood Secondly even accepting the defence theory for the sake of argument that the appellant was holding only the butt of the gun (i e handle portion) it has to be held that the trigger with its guard which is generally attached to the butt of the gun was on the side of the appellant The admitted case is that the gun in question was a hammer action gun which was manually operated, but not an automatic or semi-automatic one As deposed by P W 10, the ballistic expert that accidental firing occurs only when a hammer gun is defective otherwise there is no possibility of accidental firing taking place irrespective of the fact whether the gun is a hammer or hammerless one There is no evidence in the present case that it was a defective one Further it is not the case that during the course of the struggle of pulling the gun it fell down and due to the poor mechanism the shot went off accidentally Normally unless one pulls the trigger there is no possibility of the shot being fired So it can be safely inferred that the appellant who admittedly was holding the butt had fired the shot by pulling the trigger Thirdly both the barrels of the gun on examination were found to have contained two fired cartridges indicating two shots were fired Fourthly, the ballistic expert who microscopically examined the gun has deposed that he reached to the conclusion that the cartridges marked as E C I and E C 2 were fired from the left and right barrels of the gun (Ext 1) respectively Fifthly it is neither the case of the defence nor even a suggestion to the effect that after the appellant had left the scene, somebody had fired the second shot Sixthly, if the defence theory is to be accepted then the gun besides one fired cartridge should have contained a live cartridge also Seventhly according to P W 4 the deceased should have been shot within a range of 1 ft to 4 ft

19 All the above oral and circumstantial evidence clearly reveals that it was the appellant who fired the shot at the deceased deliberately and the defence theory of accidental firing is nothing but a fabricated story as rightly concluded by both the courts below and that the deceased did not die instantaneously, but lived for nearly two hours

20 The next bone of contention is that considering the injuries suffered by the deceased it could have been neither possible nor probable that the deceased would have got up after receipt of the gun shot injury and snatched away the gun from the hands of the appellant and could have been in a position to make any dying declaration In support of the above contention, much reliance was placed on the testimony of P W 4 and the contents of Ex P 8,, the post-mortem certificate which evidence shows that the pleura, liver and lung of the deceased were all punctured on the right side of the body that the twelfth rib was fractured that 400 c c of blood had been collected in the right chest cavity besides two litres of blood in the abdominal cavity and that there was a hole on the sternum and extensive laceration of both lobes of the liver and gall bladder P W 4 has opined that the injured might have died instanteneously or some time thereafter As pointed out earlier PW-4 though could not give positive answers to certain questions he is very assertive when a specific question was addressed to him stating that the deceased could have snatched the gun We feel that it would be appropriate to reproduce the question and answer in this regard for proper understanding the opinion of P W 4

'Ques If any victim is not in a state of shock after being so much injured whether he can do such act or not as jumping and snatching something from a young man?

Ans Yes he can

21 In Ex P-8, it is mentioned that the margins of the injury were lacerated and inverted with charrying and tattooing around the wounds Taking this feature into consideration, P W -4 has opined that the shot should have been fired by the assailant standing at a distance of 1 foot to eight feet from the deceased In other words the shot was fired within a close range The deceased aged about 33 years was a strong man with a six feet height whereas the appellant was hardly 4' and few inches in height According to P W 5 the deceased gave the dying declaration Ex Ka-11 at about 4-50 p m P W 2 started recording the dying declaration, Ka 3 at about 5-10 p m and stopped the same at about 5-20 p m before it could be completed since the deceased could not speak further However, he died by 5-30 p m The evidence of P Ws 2 and 5 indicates that the deceased was alive up to 5-30 p m i e for two hours after receipt of the injury as concluded in the preceding part of this judgment

22-23 Considering the facts that the deceased was a strong man of 33 years and was standing very close to the appellant and that he did not instanteneously die we safely infer that the deceased on receipt of the injury by a spontaneous reflection and by either voluntary or involuntary impulse would have suddenly sprung upon the appellant like a wounded tiger and forcibly snatched away the gun and the appellant on becoming unnerved on seeing P Ws 1 and 3 rushing to the scene spot and on being taken aback by the sudden and unexpected spring of the deceased had let loose the grip of the gun and abruptly got into the jeep the engine of which was on and made good his escape The High Court before which a similar contention has been raised, after making reference to certain excerpts of some renowned authors on "Medical Juris prudence and Toxicology has concluded thus —

"In view of the above medical authorities it cannot be held that the victim of the present occurrence must necessarily have gone into shock immediately on receiving the injuries mentioned in the post-mortem report rendering him incapable of rising and snatching the gun "

We are in full agreement with the above finding of the High Court for the reasons assigned herein before

24 We shall now examine the question whether the deceased could have given the two dying declarations Ext Ka-11 and Ext Ka-3 to P Ws 5 and 2 respectively

25 As pointed out ibid, the victim had sustained serious injuries and was lingering Though the nature of the injuries may lead to an inference that the probability of the victim becoming unconscious could not be completely rule out it could also be safely inferred that the victim who was 33 years old with robust constitution might have been fully conscious till his end However, as the faculty of memory and speaking could not be said to have been impaired the victim, if not had become unconscious could have given these two dying declarations It is pertinent to note that nothing has been elicited from P W 4 regarding the capability of the deceased making any declaration Not even a suggestion is made by the defence either to P W 2 who recorded the second dying declaration Ext Ka-3 or to P W 4 who conducted necropsy that the victim after receipt of these injuries could not have given the dying declarations Therefore, the question whether the deceased had given the dying declarations or not would depend upon the reliability and acceptability of the testimony of P Ws 2 and 5

26 The first dying declaration (Ext Ka-11) was recorded by P W 5, who was then a lecturer in Baldev Vidia Inter College, Palia P W 5 knew both the deceased and the accused as both of them had been his students He recorded the dying declaration as requested by the Principal and another lecturer, by name, Shrikant Shukla It is the evidence of P W 5 that he recorded Ext Ka-11 only after ascertaining the fact that the injured Raj Kumar was in a fit condition to make a statement voluntarily In fact, a certificate (Ext Ka-11A) has been appended to the dying declaration which certificate reads thus

> ' The above statement was made before me (Shri Raj Kumar Dixit, Ram Kumar Trivedi, Shrikant Shukla) in fit state of mind without any pressure Whatever was spoken to — by Raj Kumar was written and read over to him and his signatures were obtained These are the signatures of Raj Kumar "

26A The assertion of P W 5 that he took the signatures of Raj Kumar in Ext Ka-11 and the evidence of P W 6, brother of Raj Kumar, identifying the signatures of Raj Kumar in the said document had not been challenged by the defence P W 5 continues his evidence stating that after recording Ext Ka-11 and appending the certificate Ext Ka-11A he put it in a sealed envelope (Ext Ka-12) and handed it over to the Chief Judicial Magistrate

27 The only suggestion addressed to this witness is what he had recorded is not the declaration given by the deceased, but it is only a fabricated document concocted by having a deliberation with the Principal and certain Congress leaders This suggestion, in our opinion, has to be simply mentioned for rejection Yet another criticism levelled by the defence is that the Sub-Inspector of Police (P W 11) who telephonically requested the Principal to record the dying declaration did not exhibit any inquisitiveness to know the contents of the dying declaration Even assuming the conduct of P W 11 is to be condemned in not immediately coming to the hospital and taking any interest as to what was the nature of the statement by the deceased, that itself would not be a ground to reject this valuable document, namely, the document which commands acceptance at the hands of this Court

28 The second dying declaration Ext Ka-3 in the form of questions and answers was recorded by P W 2 commencing the same at about 5-10 p m after administering glucose water and giving injection and on being satisfied that Raj Kumar was in a fit condition to make a statement P W 2 stopped the recording of the dying declaration by 5-20 p m when the declarant could not give any answer to the question with which weapon he was assaulted Thereupon P W 2 forwarded this dying declaration which is complete so far as the involvement of the appellant is concerned, though otherwise

incomplete, to the Chief Judicial Magistrate by putting it in a sealed envelope It seems that on the particular day P W 2 had been to Paraspur to attend an opening ceremony of a Maternity Sub Centre and the second Medical Officer had gone to inspect a site for the purpose of starting a Government Hospital at Chandan Chowk Therefore, there was no officer present in hospital at the time when the injured Raj Kumar was brought by 5 00 p m According to P W 2, though he had requested a lady doctor to attend to the urgent cases the compounder failed to inform the said lady doctor Much argument was advanced on the failure of the lady doctor in attending on the injured but in our view it does not merit consideration in the light of the evidence of P W 2 A cursory glance of Ext Ka-3 would show that it is incomplete Had P W 2 been a party to manipulate a false dying declaration as suggested by the defence, he would have definitely done it in a better way by preparing the dying declaration with more details, inclusive of the nature of the weapon used The suggestion that the thumb impression of the deceased was taken in the manipulated dying declaration only after his death is liable to be rejected for the reasons earlier stated According to P W 2 as Raj Kumar was not in a position to sign the dying declaration, he put his thumb impression After carefully going through the evidence of P Ws 2 and 5 and the contents of Ext Ka-11 and Ext Ka-3 we are of the firm view that the credibility of these two witnesses is not in any way shaken despite the fact that these witnesses have been subjected to incisive and searching cross-examination In fact both the Courts below have thoroughly scrutinised the veracity of the two dying declarations and have rightly spurned the criticism made by the defence and accepted and acted upon them We are in full agreement with the concurrent conclusion, arrived at both by the trial and appellate Courts and we, therefore, have no compunction in placing much reliance on Exts Ka-3 and Ka-11 which are free from any infirmity and which are with a stamp of truth and reliability

29 The last contention of the defence is that as P Ws 1 and 3 are the brother and farm servant of the deceased respectively, their ocular testimony should be rejected altogether as having been tainted with interestedness This contention in our opinion, does not merit consideration for more than one reason Firstly, the presence of these two witnesses in the scene of occurrence is more probable since the occurrence took place inside the farm field belonging to the family of the deceased

30 Secondly, it was P W 1, even at the earliest point of time, went to the police station, handed over the weapon of offence and laid the written report Ext Ka-1 in which the name of P W 3 is specifically mentioned as having witnessed the occurrence along with P W 1

31 Thirdly the deceased himself in his first dying declaration Ext Ka-11 had mentioned that P Ws 1 and 3 witnessed the entire occurrence and came to the scene spot

32 Fourthly, since the presence of P Ws 1 and 3 in scene at the relevant time of the occurrence is satisfactorily established and the credibility of their testimony is neither impaired nor successfully impeached, the testimony can be candidly believed and safely acted upon

33 Fifthly, the evidence of P Ws 1 and 3 is amply corroborated by the medical as well as the circumstantial evidence

34 Sixthly, since the testimony of P Ws 1 and 3 is found to be intrinsically reliable and worthy of credit on being subjected to strict and careful scrutiny there is no impediment in accepting that evidence and it is not the law as repeatedly ruled by this Court in various decisions that the evidence of an interested witness should be equated with that of a tainted witness

35 Mr Lalit before winding up his arguments hesitantly made a fervent but futile plea regarding the nature of offence though not specifically pleaded the right of private defence as unsuccessfully pressed before the

High Court As we have totally rejected the defence theory of accidental firing and come to the inescapable conclusion that it was a deliberate homicidal firing, resulting in the death of the deceased, this plea is not at all available to the appellant

36 Resultantly, we are of the firm opinion that the prosecution has established the guilt of the appellant under both the charges beyond all reasonable doubts by adducing overwhelming and flawless oral, documentary and circumstantial evidence which is demonstrative and decisive in proving the perpetration of this atrocious crime by the appellant and consequently we uphold the impugned judgment of the High Court and affirm the convictions under both the charges and the sentences imposed therefor

37 The appeal is dismissed accordingly

Appeal dismissed

1991 ALL L J 617
= 1991 Cri L J 1690
S I JAFRI J

Nafees Haider Applicant v State U P Respondent

Criminal Misc No 2258 of 1990, D/ 17 12 1990

Criminal P C (2 of 1974), S 205 — Exemption from personal attendance in Court — Applicant serving abroad — Case of petty nature — Grant of exemption not likely to harm complainant or state in conduct of trial — Exemption cannot be refused

(Paras 2, 3)

Mr Kamal Krishna, Advocate, for Applicant A G A , for Respondent

ORDER — Instant application has been filed by Nafis Haider under S 482, Cr P C prayeing therein that the order dated 27th Oct 1990 passed by C J M Jaunpur issuing thereby non bailable warrants against the applicant in complaint case No 3700 of 1990 It has also been prayed by the learned counsel for the applicant that the applicant be exempted of his personal attendance in the Court of C J M. Jaunpur where the aforesaid case is pending

2 I have heard Sri Kamal Krishna learned counsel for the applicant as well as the learned counsel for the State The learned counsel for the applicant has submited before the court that the applicant has been serving in Saudi Arabia and as such it is not possible for the applicant to be present on each and every date in the court below It is next contended by the learned counsel for the applicant that an application seeking exemption of personal attendance in the court was moved before the C J M Jaunpur and while rejecting the application of the applicant the learned C J M issued non bailable warrants for securing attendance of the applicant fixing 14 12 1990

3 I have considered the facts and circumstances of the case and taking into account the submissions advanced by the learned counsel for the applicant feel that case for exemption of the applicant s personal attendance in the court below is amply made out It would be useful to observe that in cases of petty nature like the present one, the court should have liberal approach as by grant of such exemption it would result in no harm either to the complainant of the state in the conduct of the trial

4 In the result, the order dated 27th Oct 1990 passed by C J M Jaunpur is set aside The applicant is directed to move fresh application before the C J M Jaunpur for seeking exemption of his personal attendance in the court below which the C J M is directed to allow thereby exempting the applicant of his personal attendance in the aforesaid complaint case No 3700 of 1990 However the applicant is directed to present himself before the court at the time of recording of his statement under S 313 Cr P C and thus, the application is finally disposed of

Order accordingly

BI/DI/A133/91/RAM/VVG

1991 ALL L J 618

= 1991 Cri L J 1697

PALOK BASU J

Jagdish Chandra Dixit and others, Applicants v Rabindra Dixit and others, Respondents

Crl Misc Appln No 5941 of 1990 D/ 28 11 1990

(A) Penal Code (45 of 1860), S 494 — Bigamy — Second marriage solemnised before coming into force of Hindu Marriage Act — Bigamy not an affence prior to coming into force of Act — Provisions of S 494 not applicant

Hindu Marriage Act (25 of 1955), S 17

(Paras 4, 5)

(B) Criminal P C (2 of 1974), S 482 — Abuse of process of court — Second marriage by complainant's father — Complaint filed after 35 years — Complaint was purposive and with ulterior motive — Liable to be quashed

(Para 6)

Sri K P Rajpai Advocate for Applicants A G A Sri Umesh Chandra Misra for

Respondents

ORDER — In this petition under S 482, Cr P C Jagdish Chandra Dixit, his wife Smt Shanti and Narendra Deo, brother of Jagdish Chandra, have prayed for quashing of a complaint giving rise to Criminal case No 540/1990 in the Court of 4th Additional Chief Judicial Magistrate Etawah in which the applicants were summoned by an order of the Magistrate dated 21 4-1990 to face trial under S 494/120/ B/109, I P C

2 The days of Ramayan are gone when at the mere asking of the father the son would voluntarily go to exile for 14 years in pursuance of the desires of the step mother Now has ushered an era when a son is challenging the conduct of the father in contracting a second marriage The complainant Ravindra Dixit has filed the complaint under the aforesaid sections alleging that his father Jagdish Chandra Dixit and Chameli Devi his mother, were responsible for bringing him into mortal existence in July 1954 About four five months after his birth, Jagdish Chandra Dixit contracted a second marriage with Smt Shanti Devi in which applicant No 3 Narendra deo had participated These are the facts on the basis of which S 494, I P C is sought to be attracted and the son is desirous of prosecuting his father, stepmother and uncle

3 The very basis of a prosecution under S 494 I P C is the prohibition of second marriage under the existing personal Law If there is or was no such prohibition in the personal Law the applicability of S 494, I P C would simply be ruled out The Section would be attracted only when one having a husband or wife living marries the other during the lifetime of first husband or wife Then only he or she must be punished with terms of imprisonment described therein

4 It is interesting to remember that prior to the coming into force of The Hindu Marriage Act 1955 a Hindu male was not prohibited from contracting a second marriage even during the lifetime of the first wife S 17 of the Hindu Marriage Act, may be usefully quoted here —

Section 17

> 'Any marriage between two Hindus solemnised after commencement of this Act is void if at the date of such marriage either party had a husband or wife living and the provisions of Ss 494 and 495 of the I P C shall apply accordingly '

5 The Hindu Marriage Act 1955 came into operation on 18th May 1955 Therefore, on the facts gathered from reading of the complaint, it must be concluded definitely that the marriage of Jagdish Chandra Dixit, with Smt Shanti Devi had been performed in the year 1954 That being so, the complainant son is not justified to think that S 494, I P C was attracted to the solemnising of his father's marriage with his step mother

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CI/DI/A184/91/HK/VNP

6 One fails to comprehend the wisdom behind the action of the son in attempting to prosecute his father for alleged bigamy admittedly committed about thirty five years ago The suspeicion is irresistible that the complaint is purposive and has been filed with ulterior motives The anxiety to get some other scores settled, may be some property dispute, appears to be the purpose of filing this complaint rather the desire to get the accused punished Using the machinery of Criminal law after thirty five years of the alleged offence is itself enough to indicate abuse of the process of the Court

7 In view of the aforesaid reasons this application is allowed The complaint and further proceedings in Case No 504/1990 pending before the 4th Additional Chief Judicial Magistrate, Etawah are quashed in exercise of the inherent powers of this Court

Petition allowed

1991 ALL L J 619

= 1991 Cri L J 1698

PALOK BASU, J

Ram Nazar Tiwari, Applicant v State of Uttar Pradesh, Respondent

Cril Misc Transfer Appln No 8309 of 1990, D/ 26 11 1990

Criminal P C (2 of 1974), S 407 — Transfer of case — Convenience of parties — Two cases instituted regarding same subject-matter in different districts — Court within whose jurisdiction subject-matter and witnesses were situated would have jurisdiction to try the cases

Penal Code (45 of 1860), S 379

(Paras 2, 3, 4)

Sri R B Tripathi Advocate, for Applicant A G A, for Respondent

ORDER — In this transfer application under S 407, Cr P C a short question arises to decide which the necessary factual background needs to be mentioned

2 There is a shop known as Janta Kendriya Upbhokta Sahkari Bhandar Ltd situated in Rudrapur district Deoria, Ram Nazar Tiwari, applicant was allegedly the salesman in the said Bhandar and one Gaya Prasad Dwivedi was said to be the Secretary On 16 2 1988 an F I R was lodged by the applicant against Gaya Prasad Dwivedi which gave rise to the case Crime No 444 of 1990 of Police Station-Rudrapur After investigation the police has admittedly filed a charge sheet under S 380 I P C against Gaya Prasad Dwivedi which is now pending in the court of I Judicial Magistrate Deori Another F I R has been lodged by Gaya Prasad Dwivedi through the Co-operative Cell at Gorakhpur under S 409 I P C against Ram Nazar Tiwari applicant After due investigation the said case has been charge-sheeted by the police and is now pending as Case No 1958 of 1990 under S 409 I P C in the court of Judicial Magistrate, I Gorakhpur

3 The controversy is as to whether the two cases which admittedly relate to the goods belonging to the said Bhandar should be tried together by the same court or not Sri R B Tripathi learned counsel for the applicant stressed that since all the witnesses even in the case instituted at Gorakhpur belonged to Deoria, the place of incident also happens to be Rudrapur situated in the district of Deoria and that the allegations pertain to the district Deoria, interest of justice requires that two trials should be held in Deoria

4 Sri Surendra Singh learned A.G A for the State however stated that since the Gorakhpur F I R was properly investigated by the Co operative Cell has jurisdiction to institute the charge-sheet in Gorakhpur, the said trial should remain in Gorakhpur He has, however, not been able to dispute the fact and the assertions that the witnesses and the subject-matter of the trial pertains to district Deoria because it is the alleged embezzlement or theft in the Bhandar which is the subject matter of the trial in either of the cases in the two districts

5 It would, therefore, be convenient for the witnesses and the parties to get the trial adjudicated at the district Deoria

6 Sri Tewari has, however, made a prayer that the case at Deoria should be sent to Gorakhpur During the course of arguments however, he amended his prayer and said that in order to do substantial justice the case at Gorakhpur should be sent to Deoria

7 In view of the aforesaid discussions this application is to be allowed The trial No 1958 of 90 arising out of the F I R dated 31 3 88 under S 409 I P C now pending in the court of Judicial Magistrate Gorakhpur shall stand transferred to the district Deoria The C J M Deoria is directed to try the two cases referred to above himself or direct both of them to be tried by a competent court

Order accordingly

1991 ALL. L J 620

= 1991 Cri L J 1779

S K MOOKERJI AND
S I JAFRI JJ

State Appellant v Akhtar Khan Respondent

Government Appeal No 2131 of 1978, D/ 23 7 1990

(A) Penal Code (45 of 1860), Ss 304 II, 323, 34 — Culpable homicide — Appreciation of evidence — Presence of witnesses at scene of occurrence natural — Infirmity or discrepancy not found in their statement rendering it unworthy of reliance — Occurence taking place in broad day light — Motive to falsely implicate accused not shown — Conviction and sentence held was proper

Evidence Act (1872), S 3,

(Paras 11, 12)

(B) U P Children Act (1951), S 27 — Punishment — Accused a minor on date of occurrence — Cannot be subjected to undergo imprisonment — However considering that offence was brutal sentence of fine imposed

Penal Code (1860), Ss 304-II, 323, 34

Once the accused is found to be minor on the date of the occurrence, it would militate against the requirements of law that a minor be sentenced to undergo imprisonment However taking into account all the facts and circumstances and the brutal nature of the offence committed by him it would be just and proper to sentence him to pay fine instead of imprisonment

(Para 16)

D G A for Petitioner Sri G S Chaturvedi Advocate, for Respondent

S I JAFRI, J — State has filed this appeal impugning thereby the judgment and order dated 16 3 1978 passed by Sri B B L Hajeley Ist Addl S [illegible] Moradabad By its appeal the State of U P has impugned the conviction of the respondent Akhtar under S 304 I P C Part II and also of the offence under S 323/34 I P C and purging of the respondent of the charges under Ss 302/34, 324/34, I P C

2 Respondents Akhtar Khan Achchan Khan and Ali Dad Khan have also filed connected Criminal Appeal No 796 of 1978 in which they have assailed the judgment and order passed by Sri B B L Hajeley Ist Addl Sessions Judge Moradabad dated 16 3 1978 recording conviction and sentences in Sessions Trial No 155 of 1976 Akhtar Khan, respondent was convicted under S 304 Part II I P C and sentenced to undergo R I for 5 years He was also found guilty under S 323/34 I P C and was sentenced to undergo R I for one year Achchan Khan and Ali Dad Khan respondents were convicted under S 323/34, I P C and they were sentenced to undergo R I for one year each

3 We also find Criminal Revision No 588 of 1978 connected with the present Government appeal preferred by Saddiq complainant impugning thereby the judgment and order passed by Sri B B L Hajeley Ist Addl Sessions Judge in S T No 155 of 1976

thereby acquitting Mushfiq alias Muzbik and further altering the conviction of the respondents Akhtar Khan to S 304, Part II and S 323/34 I P C and respondents Achchan Khan and Alidad Khan to S 323/34, I P C

4 The facts of the case as disclosed by the prosecution are that there was bad blood between Akhtar and deceased Shabbir alias Munna preceding the date of occurrence owing to the fact that Akhtra had been assaulted and humiliated by deceased Shabbir alias Munna The bad blood between deceased and respondent Akhtra culminated into the present occurrence on 14th December, 1975 when complainant Siddiq along with his brother Shabbir alias Munna (deceased) and Kallu were on way to their fileds to fetch Barseen and as soon as they arrived at their mango grove accused persons Akhtar, Achchan, Muzbik Khan and Alidad Khan who were sitting in the grove, came charging towards the deceased declaring that they would teach a lesson for beating Akhtar accused Altercation ensued. It started with grappling and then Akhtar gave a vicious jab by means of A knife in the back of deceased Munna while Alidad and Achchan accused had caught of the deceased and thrown him on the ground with back up Accused Muzbik who has been acquitted by the trial Court attacked the complainant Siddiq by means of his knife which the complainant Saddiq warded off on his hand Meanwhile witnesses, namely, Nasir Hussain, Syed Farooq Khan, Laddan Khan etc were attracted to the scene of accurrence On being challenged by the witnesses, the accused persons bolted away from the scene It is worthwhile to mention here that in the occurrence, complainat saddiq, Kallu also sustained injuries as a result of assault by the accused persons Shabbir alias Munna died on the spot

5 After the occurrence, Saddiq complainant went to the Police Station, Bilari where he dictated his oral report of occurrence to the Head Constable The Head constable prepared a chik report on the basis of the dictation of the complainant and registered a case in the General Diary of the Police Station against the accused persons under Ss 302/34 and 324, I P C

6 Complainant Saddiq was examined for the injuries at P H C Bilari on 14-12 1975 at 18 hrs and Dr A K Garg, found the following injuries on his person

1 Contusion 7 0x3 0 c m. reddish, obliquely placed on the outer side of right upper arm at about middle of it

2 Incised wound 0 8x0 5 c m x skin deep bleeding present on the outer side of middle front of right index finger

3 Contusion 3 0x2 5 c m on the back of left side, reddish traversely placed 4 0 c m below the lower angleshoulder bone

4 Contusion 3 0x2 0 c m reddish traversely placed on the back of right leg over the calf muscle

7 Kallan was also examined for his injuries at P H C Bilari on 14 12 75 at 18 30 hrs and Dr A K Garg found the following injuries on his person

1 Contusion 4 0x3 0 c m reddish traversely placed on the outer and back surface of left upper arm 10 9 c m above the elbow joint

2 Contusion 6 0x4 0 c m reddish traversely placed on the back of left fore arm 11 0 c m below the elbow joint

3 Two long abrasions 5 0 c m and 3 5 c m x2 5 c m apart from each other reddish, obliquely placed on the left side of chest 12 0 c m below the left nipple

4 Contusion 3 5 x 2 5 c m traversely placed reddish on the back of right thing 13 0 c m above the knee joint

8 Investigation of the case was taken up by Bhagwan Swarup Verma P W II and after completing investigation he submitted charge sheet against the accused persons

9 Accused persons pleaded not guilty to the charge and attributed their false implication in the case to enmity The defence examined in support of its case two witnesses namely, Chhotey Khan D W 1 and Chandan Singh Negi D W 2

10 In support of its case, the prosecution examined in all 13 witnesses out of them Saddiq P W 4, Kallan P W 6 Farooq Khan P W 7 and Laddan Khan P W 10 were examined as ocular witnesses of the occurrence

11 We have carefully examined the statement of complainant Saddiq P W 4 from all possible angle He has dwelt in detail about the occurrence We have also scanned the finding arrived at by the trial Court with regard to the deposition of this witness The learned trial Court has elaborately dealt with his evidence The witness has also been subjected to gruelling cross examination and in the entire conspectus of his evidence and cross examination the defence has not been able to spin out any infirmity or discrepancy which may render him unworthy of reliance Under the circumstances, we hold Saddiq thoroughly reliable and natural witness who has given a truthful and graphic version of the occurrence

12 The evidence of Saddiq has been lent full corroboration by Kallan, Kallan is also an injured witness The occurrence took place in broad day light and defence has not been able to prove any motive for the witness to have falsely implicated the accused in this case We have also gone through his evidence and examined the same in the light of the facts and circumstances on record Upon a consideration of the facts and circumstances on record, we hold him reliable and disinterested witness We are also in complete agreement with the findings arrived at by the trial Court

13. We have also gone through the evidence adduced by defence in support of its case The evidence examined by the defence is of formal nature and does not help the defence in any way

14 As to the offence proved against the respondents as also held by the trial Court, We are of the view that the accused were rightly convicted inasmuch as that the deceased had sustained one injury following scuffle between the accused and the deceased The trial Court has given cogent reasons in acquitting the accused of the charge of murder Under the circumstances, we uphold the conviction of accused Akhtar under S 304 Part II I P C and also under S 323/34, I P C Likewise the conviction recorded against accused Alidad Khan, Achchan Khan under S 323/34 I P C is also upheld Consequently the appeal preferred by the State against the respondent carries no force and is dismissed The connected revision filed by the complainant against respondents any Muzabir Khan (since acquitted) is also dismissed

15 At this stage, the learned counsel for the respondent Akhtra contended that the trial Court has fallen in error in sentencing accused Akhtar to jail imprisonment as he was minor on the date of the commission of the offence This contention of the learned counsel is borne out from the evidence on record which goes to show that Akhtar was about 14 years and 10 months' old on the day when the occurrence had taken place

16 We have given our considered thought to this aspect of the matter and delved into the findings arrived at by the trial Court We find that the trial Court has not adverted itself to this aspect From a scrutiny of the facts on record we find that admittedly the accused, namely, Akhtra was aged about 14 years and in this view of the matter he was minor by all reckoning on the date of occurrence Once he is found to be minor on the date of the occurrence, it militates against the requirements of law that a minor be sentenced to undergo imprisonment We are fortified in our views by S 27, Chapter IV of U P Children Act, 1951 which stipulates that no Court shall sentence a child to death or transportation or imprisonment for any term, or commit him to prison in default of payment of fine The trial Court without adverting to this facet, awarded sentence of 5 years' R I to the respondent. At the same time, we are not oblivious to the outrageous nature of the offence in which a young lad, namely, deceased Shabbir alias Munna, who was aged about 18 years only, lost his life

Notwithstanding the fact that Akhtar respondent was minor and by requirements of law, he cannot be sentenced to undergo imprisonment as an alternative, we deem it just and proper to sentence the respondent Akhtar to pay fine Taking into account all the facts and circumstances and brutal nature of the offence committed by Akhtar we propose to sentence the respondent Akhtar to pay a fine of Rs 6000/ However, it is made clear that in default of payment of fine as imposed by this Court, the respondent Akhtar who has been held to be minor on the day of occurrence cannot be subjected to undergo imprisonment. However, the Court below shall be at liberty to use all coercive measures to realise the amount of fine from the property owned by respondent Akhtar

17 Coming down to the conviction of the respondent Alidad Khan and Achchan Khan the conviction recorded against them under S 323/34 I P C by the trial Court, is affirmed. As to the sentences recorded against the respondents aforesaid, the learned counsel submitted that more than 15 years have rolled by since the date of occurrence and no useful purpose will come to be served by committing the respondent to Jail for serving out the sentences after this long lapse of time It is not contended by the learned counsel that hostility has become a matter of past and both the parties are living with love and affection It is next submitted by the learned counsel that it would meet the ends of justice if the respondents are sentenced to pay fine instead of being sent to jail to serve out the sentences awarded by the trial Court. We also feel that ends of justice would be met if the respondents are sentenced to pay fine

18 In the result, appeal preferred by respondents Alidad Khan and Achchan is partly allowed The conviction recorded against both the respondents namely Ali Dad Khan and Achchan under S 323/34 I P C is affirmed. However both the respondents are sentenced to pay a fine of Rs 500/ each, which shall be payable by them within 3 months from the date of the receipt of the record from this Court in the trial Court In their failure to pay the fine within 3 months, the respondents Alidad Khan and Achchan shall undergo R I for three months

19 Appeal preferred by Akhtar respondent is also partly allowed The conviction recorded against Akhtar under S 304, Part II, I.P C is affirmed However the sentence of 5 years R I awarded to him by the trial Court is set aside Instead, the respondent Akhtar is sentenced to pay a fine of Rs 6000/ which shall be payable within 3 months in the trial Court In default of payment of fine, the trial Court shall be at liberty to use all coercive measures except to send the respondent to jail. Out of the amount of fine of Rs 6000/ a sum of Rs 5000/ shall be disbursed to the heirs or legal representative of deceased Shabbir and the remaining sum of Rs 1000/ shall go to the State exchequer Likewise, out of the amount of fine realised from respondent Ali Dad Khan and Achchan, which works out to Rs 1000/ a sum of Rs 400/- each shall be disbursed to Saddiq P W 4 and Kallan P W 6 and the remaining sum of Rs. 200/ shall go to the State exchequer

20 Revision petition preferred by Saddiq complainant is accordingly dismissed. Government Appeal No 2131 of 1978 preferred by the State of U P is also dismissed accordingly

21 Office is directed to send a copy of this judgment to the trial Court along with record within one month of the receipt of the judgment at its end

Order accordingly

1991 ALL L J 624

ALLAHABAD

S R BHARGAVA J

Chandra Pal Singh, Applicant v State of U P and another, Opposite Party Criminal Revision No 1209 of 1990, D/ 15 3 91

Criminal P C (2 of 1974), S 319 — Summoning of persons other than accused — Evidence of prosecution witness showing prima facie case against complainant — He can be summoned under S 319 — Complainant not likely to abscond — Need of his arrest, remand or detention does not arise

Where in a case of assault it was found on the evidence of two prosecution witnesses examined by the Sessions Judge that there was prima facie case of exhortation against a certain person the Session Judge could summon such person under S 319, however he being President of Zilla Parishad there would be no apprehension about his absconding and as such there would be no need to arrest or detain him or remand him (Paras 6, 8, 9)

Wajahat Husain Khan, for Applicant Shree Ram Gupta for Opposite Party

ORDER — This revision under Section 397 Cr P C , is directed against an order under Section 319 Cr P C passed by II Addl Sessions Judge, Banda, in Sessions Trial No 35 of 1989 under Sections 307/325 I P C State Versus Sudas and one Lekhan Singh

2 It is not disputed that revisionist Chandra Pal Singh is President of Zila Parishad, Banda In first information report lodged by complainant Shiv Raj Singh on 5th June, 1988, allegations were that at about 9 30 a m on the same day when the complainant and his men went to cast votes, supporters of candidate of Matganjan on the order of Chandra Pal Singh, Lakhan Singh, Sudas, Shyamlal and Ravendra Singh started quarelling They used their weapons, resulting into injuries to complainant and others Witnesses rescued them After investigation, charge sheet was filed against Sudas, Shyamlal and Ravindra Singh only It was motioned in the charge sheet that investigation was proceeding against Lakhan Singh, But the charge sheet was not filed against revisionist Chandra Pal Singh Sudas, Shyamalal and Ravindra Singh were Committed to Session for facing trial under Section 307 I P C etc After these three accused were charged with different offences, the learned Addl Sessions Judge recorded evidence of complainant Shiv Ram Singh P W 1 and witness Shiv Raj Singh, P W 2 It emerged in their evidence that the assault took place at the spot on the exhortation of Chandra Pal Singh Complainant Shiv Ram Singh moved application for summoning Chandra Pal Singh and Lakhan Singh under Section 319 Cr P C Learned Addl Sessions Judge referred to evidence recorded before him and also the evidence in the case diary and summoned both Chandra Pal Singh and Lakhan Singh under Section 319 Cr P C

3 Being aggrieved, Chandra Pal Singh has filed the present revision

4 For appreciating the arguments advanced in this revision, it would be useful to note the provisions of 319(1) Cr P C which runs as under —

' Section 319(1) — Where in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which be appears to have committed Words "it appears from the evidence" are preceeded by words "in the course of any inquiry into, or trial" They are not preceeded by words "investigation"

It can be safely said for the purpose of summoning apperson for joint trial, the court proceeding with the inquiry or the trial should confine itself to the evidence adduced before it The evidence collected during investigation cannot be basis for summoning a person for joint trial under S 319(1) Then the word appears' occurring in this section is significant It has been used at two places in the sub-section and has same connotation Word appears does not mean proves', it only signifies that there is prima facie case against the person summoned under Section 319(1) Cr P C for joint trial The third feature of this sub-section is that the power given in the sub-section is for justice and the court can exercise this power suo motu or on application of any of the parties Under this sub-section a court has jurisdiction to summon a person even on the application of complainant The only pre-requisite is, it should appear from the evidence that the person sought to be summoned, not being an accused, has committed any offence for which he should be tried together with the accused

5 One of the grounds of revision was that the revisionist was summoned under S 319 Cr P C on the application of the complainant But as noted above, this ground can have no substance

6 Perusal of the impugned order shows that the learned Addl Sessions Judge, not only relied upon the evidence before him but also the evidence collected during investigation This was improper and beyond the jurisdiction of the Sessions Judge Nevertheless, revisionist was named in the first information report Although the allegation against him in the first information report was unhappily worded yet it connected exhortation Then there were statements of two witnesses on oath recorded by the Sessions Judge, in which it was said that the revisionist exhorted his co-accused and on his exhortation quarrel and assault took place On behalf of the revisionist reliance was placed on corss-examination of the witnesses and particularly omission in their statement under S 161 Cr P C It has already been seen that for purposes of summoning under Section 319 Cr P C only prima facie case has to be seen and meticulous examination of evidence cannot be done For summoning under S 319 Cr P C the Court has not to determine whether the evidence is reliable on meticulous examination Effect of omission during investigation can be seen only after the entire evidence is recorded and weighed I hold that on the evidence of two prosecution witnesses examined by the Sessions Judge it could be said that there was prima facie case of exhortation against revisionist Hence the Sessions Judge was justified on summoning the revisionist.

7. The impugned order of summoning need not be disturbed, but even then it is the duty of this court to note provisions of sub sections (2) and (3) of Section 319 Cr P C which run as under —

"(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed

8 These provisions are independent of Sections 87, 167 and 167A Cr P C An order, summoning a person under S 319 Cr P C is usually passed in his absence Sub-section (2) of Section 319 gives ample powers to the court to issue summons and on his attendance, if there is reason to apprehend that he would run away, to arrest or remand him at any stage Once a person has been summoned under S 319(1) Cr P C, he is required only for joint trial with other accused For assuring his attendance, court can easily resort to provisions of S 88 Cr P C and may bind down such person with his personal bond with or without sureties Sub-sections (2) and (3) clearly show that they do not contemplate that the person attending the court on the summon issued under S 319 Cr P C must be arrested, detained or remanded. The court has discretion of arrest, remand or detention for purpose of joint trial or joint inquiry but that discretion should be exercised only when

there is reasonable apprehension that the person summoned shall abscond and shall not be available for joint trial

9 In result this revision is dismissed Revisionist Chandra Pal Singh is directed to appear before the Sessions Judge concerned voluntarily On his appearance the Sessions Judge concerned shall not arrest or detain him or remand him unless the Sessions Judge has reasonable apprehension that he will abscond It is evident that revisionist is President of Zila Parishad and the Court can have no apprehension about his absconding Hence the Sessions Judge concerned shall ensure the attendance of the revisionist on future dates by requiring him to furnish bond with or without sureties

Revision dismissed

1991 ALL. L. J 626

V K KHANNA AND G P MATHUR, JJ

Ram Dhari and others, Petitioners v State of U P and others, Respondents

Civil Misc Writ Petn Nos 20895 of 1989 and 3592 of 1990. D/ 25-3-1991

(A) Land Acquisition Act (1894), Ss 3(cc), 3(e)(i), 3 (f)(iv), 4, 6, 39, 41 and 617 (as amended by Act 68 of 1984) — Acquisition of land for State Sugar Corporation — State Sugar Corporation not a Company but a Corporation owned or controlled by State — Notification under S. 6 not bad for want of agreement between Company and State Government under S. 41

U.P Sugar Undertakings (Acquisition) Act (23 of 1971), S 2(c).

Land Acquisition Act, 1894 has undergone major amendment by the Act No 68 of 1984 The definition of expressions "Company" and "public purpose" has been completely changed by 1984 amendments From the amended provisions of Ss. 3(e)(i), 3(cc) and 3(f)(iv) it is obvious that the State Sugar Corporation, for whom the land is sought to be acquired is not a Company as defined in S 3(e) of the Land Acquisition Act It is a corporation owned or controlled by the State within the meaning of S 3(cc) and therefore, the provision of land for such a Corporation would be a public purpose within the meaning of expressions 3(f) of the Land Acquisition Act Therefore by issuing of notifications under Ss 4 and 6 of the Act land is sought to be acquired by the State Government for a public purpose and not for a Company The provision of Chapter VII i e Ss 39 to 42 shall not apply Thus, the notifications cannot be said to be suffering from any vice on account of the fact that no agreement was executed by the corporation with the Government in accordance with S 41 of the Act (Para 7)

(B) Land Acquisition Act (1894), Ss 4(1), 5A, 6 and 17(4) — Acquisition of land for modernisation and expansion and for construction of labour staff quarters and effluent treatment plant of State Sugar Corporation Unit — Direction under S 17(4) dispensing with enquiry under S 5A — Writ petition challenging direction under S 17(4) — Decision can be challenged only on limited ground — Existence of sufficient material before State Government for issuing direction dispensing with enquiry — Writ petition liable to be dismissed

Constitution of India, Art 226.

It is true that a direction under Section 17(4) of the Act to the effect that provisions of Section 5A shall not apply has a serious consequence upon the persons interested in the land inasmuch as they are deprived of an opportunity of filing objections to the acquisition of their land under Section 5A of the Act But the decision of the State Government, that the case is one of urgency can be challenged only on limited grounds The question of urgency is a matter for subjective satisfaction of the appropriate government and it is not open to the Courts to examine the propriety or correctness of the satisfaction on an objective consideration of facts The opinion of the Government can be challenged in a Court of law only if it can

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DI/FI/A519/91/GDR

be shown that the government never applied its mind to the matter or that the action of the government is mala fide

Where in a writ petition challenging the notification issued under Ss 4(1) and 6 of the Act for acquisition of land for modernisation and expansion and for construction of labour staff quarters and effluent treatment plant of State Sugar Corporation Unit, no allegation of mala fide had been made against the respondents, on the contrary, the counter affidavit as well as records of the case showed that there was sufficient material before the State Government on the basis of which it could come to a conclusion that the case was one of urgency and direction could be made under sub-sec (4) of S 17 of the Act it could not be said that the State Government had acted illegally in exercising powers under S 17(4) and in dispensing with the enquiry under S 5A of the Act

Case law rel on

(Paras 8 9 11 16, 18)

Cases Referred Chronological	**Paras**
1990 All LJ 680 1990 SCD 706 AIR 1990 All 219	12
1990 All LJ 728 1990 SCD 702	12
(1990) Writ Petn No 16690 of 1990, D/ 22 10-1990 (All) Ram Narain Rai v State of U P	15
1989 All LJ 570	14
AIR 1988 All 177	14
1985 All LJ 718	14
1985 All LJ 1182	14
1985 All LJ 1405	14
1984 All LJ 1093	13
AIR 1984 All 283	6
1983 All LJ 1016	12 15
AIR 1983 All 78	14
AIR 1981 SC1694	6
AIR 1978 All 181	13
AIR 1977 SC 183	10, 12, 13 14, 15
AIR 1967 SC 1081	9

Tarun Varma, for Petitioners, M/s Virendra Singh and Rishi Ram, for Respondents

G P MATHUR, J — Writ Petition No 20895 of 1989 (Ram Dhan v State of U P) and Writ Petition No 3592 of 1990 (Gorakh v State of U P) have been filed for quashing the same notifications issued under Sections 4 and 6 of Land Acquisition Act Both the writ petitions have been connected and are being disposed of by a common judgment

2 The State Government issued a notification dated August 28 1989 under Section 4(1) of Land Acquisition Act (hereinafter referred to as the Act) The relevant portion of the notification is being quoted below for ready reference

In exercise of the powers under sub-section (1) of Section 4 of the Land Acquisition Act, 1894 (Act No 1 of 1894) the Governor is pleased to notify for general information that the land mentioned in the Schedule below is needed for a public purpose, namely for the modernisation and expansion of and for construction of labour and staff quarters and effluent treatment plant of the Uttar Pradesh State Sugar Corporation Unit, Pipraich in district Gorakhpur "

3 The Governor, being of the opinion that the provisions of sub-section (1) of Section 17 of the said Act are applicable to the said land inasmuch as the said land is urgently required for the modernisation and expansion of and for construction of labour and staff quarters and effluent treatment plant of the Uttar Pradesh State Sugar Corporation Unit Pipraich Sugar Mills in district Gorakhpur and that in view of the pressing urgency, it is as well necessary to eliminate the delay likely to be caused by an enquiry under Section 5-A of the said Act, the Governor is further pleased to direct under sub-section (4) of Section 17 of the said Act that the provisions of Section 5 A of the said Act shall not apply

4 At the end of the notification a schedule was given wherein the number of various plots which were proposed to be acquired in village Rithia, pargana Haveli,

Tehsil Sadar District Gorakhpur was mentioned This notification was published in U P Gazette of 26th August 1989 Subsequently, the State Government issued another notification dated September 16 1989 under Section 6 of the Act and the said notification was published in U P Gazette on 16th September 1989 It was mentioned in the notification that the land mentioned in the schedule was needed for a public purpose namely for modernisation and expansion and for construction of labour staff quarters and effluent treatment plant of U P State Sugar Corporation Unit Pipraich Sugar Mills in district Gorakhpur It is for the quashing of these notifications that the present writ petitions have been filed Writ Petition No 20895 of 1989 was filed in this court on 9 11 1989 It was admitted on 21 12 1989 and the dispossession of the petitioners from the plots in dispute was stayed Counter affidavit was filed on behalf of State of U P and Special Land Acquisition Officer, Gorakhpur by Shri Phool Chandra Srivastava Special Land Acquisition Officer Unit II and a supplementary counter affidavit was filed by Shishir Bajpayee Law Assistant in U P State Sugar Corporation Ltd Unit Pipraich (Gorakhpur) The petitioners filed rejoinder affidavits Subsequently the petitioners filed an amendment application on 17 1 91 for adding certain paragraphs in writ petitions after para 39 and for adding certain grounds This amendment application was allowed on 31 1 1991 Another supplementary counter affidavit has been filed by Shri Raj Kumar Joint Secretary, Cane Development and Sugar Industry U P Government on 19 2 1991

5 The learned counsel for the petitioner contended that village Rithia where the disputed plots are situate came under consolidation operations as a notification was issued by the State Government under Section 4(2) of the U P Consolidation of Holdings Act and old plot numbers as mentioned in the notification issued under Section 4(1) of the Act lost their identity on the spot on carvation and allotment of chaks He further contended on the basis of averments made in para 17 of the writ petition that the old plots alone with other plots allotted in favour of the petitioners in the form of chaks completely changed the situation inasmuch as no such plots can be said to be in existence after finalisation of proceedings under Section 20 of the U P Consolidation of Holdings Act The learned counsel for the respondents submitted in reply that in case the plots mentioned in the notification have lost their identity on the spot and the said plots are not in existence the petitioners cannot have any grievance as their rights would not be affected by the impugned notifications Faced with this difficulty Sri Tarun Verma learned counsel for the petitioners made a statement that he did not want to press this argument regarding loss of identity of plots mentioned in the schedule annexed to the notifications under Sections 4(1) and 6 of the Act on account of Consolidation Operations In view of the statement made by the learned counsel for the petitioners we are not considering this question and are not recording any finding on the submission initially made by the learned counsel for the petitioners

6 It was next contended that U P State Sugar Corporation was a company and as no agreement had been executed between the company and the State Government in accordance with Section 41 of the Act no notification could have been issued under Section 6 of the Act on account of express bar created by Section 39 It was also urged that neither any previous enquiry as contemplated by Section 40 of the Act had been done nor any opportunity of hearing was given to the petitioners in accordance with Rule 4 of the Land Acquisition (Companies) Rules, 1963 This plea was not raised in the writ petition but has sought to be introduced by amendment application which was moved on 17 1 1991 The learned counsel for the petitioners placed reliance upon a Supreme Court decision given in the case of State of Punjab v Raja Ram, AIR 1981 SC 1694 and a Division Bench decision of our Court in Abdul Ghaffar v State of U P AIR 1984 All 283 wherein it was held

that the Collector should issued notice to the person whose land is sought to be acquired while holding an enquiry under Rule 4 of Land Acquisition (Companies) Rules 1963

7 In our opinion the submission made by the learned counsel for the petitioners is wholly misconceived Land Acquisition Act 1894 has undergone major amendment by the Act No 68 of 1984 The definition of expressions company and public purpose has been completely changed by 1984 amendments Section 3(e)(ii) provides that expression company means a company as defined in Section 3 of the Companies Act 1956 other than a Government Company referred to in clause (cc) Section 3(cc) provides that the expression corporation owned or controlled by the State means any body corporate established by or under a Central, Provincial or State Act and includes a Government company as defined in Section 617 of the Companies Act 1956 Section 3(f)(iv) provides the expression public purpose includes the provision of land for corporation owned or controlled by the State Section 2(e) of the U P Sugar Undertakings (Acquisition) Act 1971 (U P Act No 23 of 1971) provides that U P State Sugar Corporation is a Government company within the meaning of Section 617 of the Companies Act It is therefore obvious that the U P State Sugar Corporation for whom the land is sought to be acquired is not a company as defined in Section 3(e) of the Land Acquisition Act It is a corporation owned or controlled by the State within the meaning of Section 3(cc) and therefore the provision of land for such a Corporation would be a public purpose within the meaning of expression 3(f) of the Land Acquisition Act Therefore by the impugned notifications land is sought to be acquired by the State Government for a public purpose and not for a company The provision of Chapter VII i e Sections 39 to 42 shall not apply The impugned notifications cannot be said to be suffering from any vice on account of the fact that no agreement was executed by the corporation with the Government The contention raised by the petitioners has therefore no merit

8 The learned counsel for the petitioners next contended that the State Government had acted illegally in exercising powers under Section 17(4) and in dispensing with the enquiry under Section 5 A of the Act The learned counsel also urged that there was absolutely no material before the State Government to show that it was a case of extreme urgency wherein the provisions of Section 17(1) of the Act may be applicable The modernisation and expansion and construction of labour and staff quarters and effluent treatment plant of a sugar mill was not such a purpose which could be described as extremely urgent where the State Government could not wait for an enquiry as contemplated by Section 5 A of the Act

9 It is true that a direction under S 17(4) of the Act to the effect that provisions of Section 5 A shall not apply has a serious consequence upon the persons interested in the land inasmuch as they are deprived of an opportunity of filing objections to the acquisition of their land under Section 5 A of the Act But the decision of the State Government that the case is one of urgency can be challenged only on limited grounds In Raja Anand Brahma Shah v State of U P AIR 1967 SC 1081 the Supreme Court held as follows in para 8 of the report

It is true that the opinion of the State Government which is a condition for the exercise of power under S 17(4) of the Act is subjective and a Court cannot normally enquire whether there were sufficient grounds or justification of the opinion formed by the State Government under Section 17(4) "

10 This was reiterated in a later decision by the Supreme Court in Narain Govind Gavate v State of Maharashtra AIR 1977 SC 163 and in para 10 it was observed as follows

It is true that in such cases the formation of opinion is a subjective matter as held by this Court repeatedly with regard to the situations in which administrative authorities have formed certain opinions before taking actions, they are empowered to take Nevertheless that opinion has to be based on some relevant materials in order to pass test which Courts do impose once the Court comes to the conclusion that the authority concerned was acting within the scope of its powers and had some material, whatever meagre on which it could reasonably base its opinion, the courts should not and will not interfere

11 It is, therefore well settled that the question of urgency is a matter for subjective satisfaction of the appropriate government and it is not open to the Courts to examine the propriety or correctness of the satisfaction on an objective consideration of facts The opinion of the government can be challenged in a Court of law only if it can be shown that the government never applied its mind to the matter or that the action of the government is mala fide

12 The learned counsel for the petitioners strenuously contended that the mind of the authority concerned has to be applied to the question whether there is urgency of such a nature that even the summary proceedings under Section 5 A of the Act should be eliminated and it is not just the existence of urgency, but the need to dispense with the enquiry under Section 5-A which has to be considered The learned counsel placed reliance on the observations of Supreme Court in paras 37 and 38 of Narain Govind Gavate v State of Maharashtra, AIR 1977 SC 183, and also upon the decision of this Court in A P Sarin v State of U P, 1983 All LJ 1016, Vinod Kumar v State of U P 1990 SCD 706 (1990 All LJ 680) and Raj Kishore v State of U P, 1990 SCD 702 (1990 All LJ 728)

13 The observations made by the Hon'ble Supreme Court in paras 37 and 38 of the report in Narain's case, (AIR 1977 SC 183) (supra) have been explained by two Division Benches of our High Court in Smt Kailash Wati v State of U P, AIR 1978 All 181, and M/s Technical Associates v State of U P, 1984 All LJ 1093 In Narain's case (supra), neither in the counter affidavit filed on behalf of acquiring body nor in the notifications issued, there was any material showing that the State Government had applied its mind to the question that there existed urgency which warranted elimination of enquiry contemplated by Section 5 A of the Act On the contrary, the Government took their stand on the plea of non justiciability of the satisfaction of the Government It was also explained that the observation made by the Hon'ble Supreme Court was only illustrative and not exhaustive of the situation in which the urgency clause could be invoked

14 There are several decisions of our Court, where after noticing the law laid down by the Hon'ble Supreme Court in Narain's case (supra) it was held that the question of urgency is a matter for the subjective satisfaction of the government and it is not open to the Courts to examine the propriety and the correctness of the satisfaction on objective appraisal of facts The opinion can be challenged in a Court of law only if it can be shown that the Government never applied its mind to the matter or its action was mala fide Reference in this connection may be made to Raj Bali v State of U P, AIR 1983 All 78, Trilochan v State 1985 All LJ 718, Mohd Hanif v State, 1985 All LJ 1405, Gayatri Nagar Sahkari Avas Samiti Ltd v State, 1985 All LJ 1182 Kunwar Lal v State, 1989 All LJ 570 and Satbir Singh v State, AIR 1988 All 177

15 In Writ Petn No 16690 of 1990 (Ram Narain Rai v State of U P) decided on 22-10 1990 by a Bench consisting of Hon'ble N N Mithal, J and Hon'ble G P Mathur J, the distinguishing feature of Narain's case, (AIR 1977 SC 183) and A P Sarin's case (1983 All LJ 1016) (supra) have been explained in detail and it was held that the question of urgency was a matter of subjective satisfaction of the Government The opinion of the Government can be challenged only if it was found that the Government had never applied its mind to the matter or if its action was mala fide

16 In the present writ petition, no allegation of mala fide has been made against the respondents Learned counsel for the petitioner has not raised any such contention that the acquisition of the petitioners land was mala fide

17. We have now to consider whether there was sufficient material before the State Government on the basis of which it could form an opinion to make a direction under sub-section (4) of Section 17 of the Act The learned Standing Counsel has produced before us the original record of the State Government and also of the U P State Sugar Corporation Ltd at the time of hearing and a supplementary counter affidavit sworn by Shri Raj Kumar IAS Joint Secretary Cane Development and Sugar Industry, U P Government, was also filed The material filed along with the supplementary counter affidavit shows that Pipraich Sugar Mill was 65 years old and had crushing capacity of about 800 TCD Since the machinery of the mill had become very old, it was not possible to run the sugar mill. The sugar mill was situate in cane growing area and there were no crushers in the neighbourhood The sugar mill, on account of low crushing capacity of 813 TCD was not in a position to utilise and consume the sugar cane produced in the area and thus the cane growers were suffering huge loss Accordingly, the Central Government was approached for grant of industrial licence for expansion and modernisation of the sugar mills. The Central Government issued a letter of intent on 29-8 1988 intimating the U P State Sugar Cane Corporation that the Government was prepared to issue industrial licence under the Industries (Development and Regulations) Act, 1951 for expansion of Pipraich Sugar Mills so as to attain the crushing capacity of 2500 tonnes, a copy of which has been filed as Annexure SCA-III The condition No 5 of the Intent Letter was that it was valid for three years from the date of its issue Annexure-SCA-IV to the supplementary counter affidavit is the copy of the communication dated 26 12 1988 sent by the Ministry of Food & Civil Supplies, Government of India to all the sugar factories regarding incentive capital scheme for new sugar factories and expansion projects It is mentioned in this communication that the Central Government had taken a decision fixing minimum economic capacity of a sugar factory at 2500 tonnes of cane crushing per day and expansion project shall mean a project for expansion of existing sugar factory, having a capacity below 2500 TCD for increase in its capacity to a minimum of 2500 TCD, in accordance with Letter of Intent issued by the Government of India. In para 6 1, it is mentioned that in order to become eligible to incentives under this scheme, the date of commencement of first production at the expanded capacity in respect of expansion projects shall be within a period of 24 months from the date Letter of Intent was issued by the Central Financial Institution granting loans to the sugar factories The factories that failed to commence production within the stipulated period shall not be eligible for any incentive Para 6 2 of the communication mentions that where a factory cannot commence production within the prescribed limit of 24 months on account of reasons such as delays in receipt of finance, beyond the control of sugar factory, an extension of time limit up to a maximum of 12 months may be granted by the Government of India based on the merits of each case SCA VII is a copy of letter dated 2 3 89 sent by the Industrial Finance Corporation of India to the Managing Director of U P State Sugar Corporation informing that it has no objection for placement of orders for plant and machinery in respect of Pipraich Unit SCA-V in a note of General Manager (P) dated 22 4 89, and also of Joint Secretary, Cane Development and Sugar Industry, U P Government dated 25-4 89 and the note dated 30 4 1989 of the Managing Director of U P State Sugar Corporation which mentions that agreement for supply erection and commissioning of plant and machinery for undertaking modernisation-cum expansion of Unit Pipraich has already been executed with M/s ATV Projects India Limited on 28 2 89 and therefore immediate steps were required to be taken to expedite the acquisition of land failing which machinery suppliers were likely to rush for release of second instalment of advance without fulfilling any obligations and other conditions for want of a suitable site for the project Annexure SCA VIII is the copy of the letter dated 19 6 1989 sent by the Chairman U P State Sugar Corporation Ltd. to the Collector Gorakhpur informing him that for expansion and modernisation of Pipraich Sugar Mill from 800 to 2500 TCD Government of India had granted a Letter of Intent on 29 8-88 and the Industrial Finance Corporation of India had also granted no objection certificate for placement of order for plant and machinery Accordingly agreement had been executed for construction of civil works and for supply and installation of the machinery A sum of Rs 29,75 973-00 had been deposited by the General Manager of the Unit with the Special Land Acquisition Officer The State Government was also pressing for immediate execution of the expansion project in public interest It was requested that necessary steps for acquisition of land may be taken immediately and necessary formalities may be completed Annexure SCA I, is the copy of letter sent by the Collector, Gorakhpur to the Joint Secretary, Industries Department U P Government informing him that there was immediate necessity of expansion of Pipraich Sugar Mills and for the said purpose the land may be acquired by invoking the provisions of Section 17 of the Act It is stated in para 12 of the supplementary counter affidavit that on receipt of report of the Collector, Gorakhpur and after taking opinion of the law department and with the concurrence of the Chief Minister the matter was examined in detail by the Industry Department of U P Government After examining the entire material referred to above, a decision was taken that the land should be acquired without any delay and necessary directions may be issued under sub-section (4) of Section 17 of the Act It is also averred that existing quarters for the workers were very few and were in a dilapidated condition and therefore it was necessary to construct residential accommodation for industrial workers It was also necessary to instal effluent treatment plant for controlling pollution After considering the entire material, notifications under Ss 4 17 and 6 of the Land Acquisition Act were issued by the State Government

18 Supplementary counter affidavit as well as records of the case show that the Letter of Intent issued by the Government of India on 29-8 88 was valid for three years i e up to 29-8 91 and in order to become eligible under Incentive Scheme, it was necessary that the date of first production of expanded capacity in respect of expansion project should be within a period of 24 months from the date of issue of Letter of Intent by the Central Financial Institution The record also shows that agreement for supply of machinery and erection and commissioning of plant had already been executed on 28 2 89 The record further shows that machinery of sugar mills was 65 years old and it was not possible to run the sugar mill with the same The crushing capacity was only 813 TCD while as the production of sugar cane in the area was much more and there was no crusher due to which cane growers were suffering heavy loss The sugar-cane is considered cash crop by farmers Gorakhpur is a sugar cane producing area The constructions of efficient high capacity sugar mill will benefit both the farmers as well as workers employed therein It is therefore clear that there was sufficient material before the State Government on the basis of which it could come to a conclusion that the case was one of urgency and direction should be made under sub-section (4) of Section 17 of the Act

19 In our opinion there is no merit in the submissions made by the learned counsel for the petitioners Both the writ petitions are accordingly dismissed and the interim orders staying the dispossession of the petitioners are vacated There will be no order as to costs

Petitions dismissed

1991 ALL L J 633

R A SHARMA J

Anurag Sharma Petitioner v Xth Additional District Judge Moradabad and others Respondents

Civil Misc Writ Petn No 31014 of 1990 D/ 20 11 1990

Civil P C (5 of 1908), O 1, R 10 — Necessary and proper party — Impleadment of — Suit for declaration of validity of sale deed — Public temple over land in dispute — Interveners/Devotees of temple, both necessary and proper parties — Fact that they had alternate remedy — Cannot be ground to refuse their impleadment

(Paras 4, 5, 6)

Cases Referred Chronological	**Paras**
AIR 1981 Delhi 237	6
AIR 1963 SC 786	3

Vishnu Sahai and B Dayal for Petitioner Standing Counsel for Respondents

ORDER — Petitioner who claims to have purchased a piece of land from the Co operative Society has filed a suit in the trial court for a declaration that the sale deed executed in his favour is valid and for permanent injunction so as to restrain the defendants from interfering with his possession In the suit filed by the petitioner some persons who are not even members of the co operative society have also been impleaded as defendants as according to the petitioner they intend to interfere with the peaceful possession of the petitioner During the pendency of the suit in the trial court respondents 7 and 8 filed application for impleadment on the ground that there is a temple on the land in dispute and the relief is claimed by the petitioner if granted temple will be demolished and that will interfere with their right of worship This application was rejected by the trial court Against this order respondents 7 and 8 filed a revision before the learned District Judge which has been allowed It is against this order of the learned District Judge that this writ petition has been filed

2 Learned counsel for the petitioner has contended that by impleadment the nature of the suit is likely to be changed which cannot be permitted under law Another submission of the learned counsel for the petitioner is that as the petitioner has purchased the land from the co-operative society the proper remedy for the petitioner is to approach the Prescribed Authority under S 70 for arbitration under U P Co-operative Societies Act

3 Under Order I Rule 10 C P C the Court can implead both necessary and proper parties As laid down by Hon ble Supreme Court in Udit Narain Singh v Board of Revenue AIR 1963 SC 786

A necessary party is one without whom no order can be made effectively a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding

A person may not be impleaded as a party if he may be incidentally affected by the judgment but a person who will be directly effected in enjoyment of his rights or a person whose presence may be necessary for deciding the controversy can be impleaded

4 In the instant case the courts below appointed a Commissioner to make local inspection who has submitted his report in which it has been stated that on the land in dispute there is a public temple with several idols installed in it The case of the interveners inter alia is that the plaintiff has filed the suit impleading their own man as defendant so as to grab the temple and its property that they are devotees of the temple and if temple is abolished or there is interference with the worship their right of worship will be seriously affected It is not necessary at this stage of impleadment to decide finally whether the allegations made by interveners or by the plaintiff petitioner are correct or not From the perusal of report of the Commissioner

and on the basis of finding recorded by the learned District Judge it is prima facie clear that there is some temple over the property in dispute It is thus obvious that the interveners are both necessary and proper parties and have been rightly impleaded by the courts below

5 In this connection learned counsel for the petitioner has argued that the interveners have a right to file a fresh suit for redress of their grievance against the petitioner and as such their application for impleadment may be rejected It is not possible for me to agree with the submission of the learned counsel It is one of the well settled principles that multifariousness of proceedings should be avoided A person who is necessary or proper party in a suit, should not be refused impleadment on the ground that he has an alternative remedy of filing a suit

6 The plea of the petitioner that if interveners are impleaded the nature of the suit will be changed, is also not sustainable Nature of the suit is to be determined by the relief claimed by petitioner in the suit The relief claimed by the petitioner in the suit is for declaring the sale deed in respect of land in dispute, executed by Co-operative Society in his favour is valid and that defendant should not interfere with his peaceful possession Those reliefs in spite of impleadment remain intact The petitioner, in order to get that relief, has to prove his case In this connection learned District Judge has observed that the petitioner has himself impleaded some persons who are not members of the Co-operative Society In view of the aforesaid position it is not proper for the petitioner to raise grievance against impleadment of these two interveners In this connection decision of Delhi High Court in Raj K Mehta v Mrs Anjali Bhaduri, AIR 1981 Delhi 237, relied upon by learned counsel cannot help the petitioner, because in that case suit was filed for specific performance of contract to sell the property, and strangers to the contract are neither necessary nor proper parties The submission of learned counsel for the petitioner that interveners, instead of getting themselves impleaded in the suit filed by the petitioner should apply for arbitration under S 70 of the U P Co-operative Societies Act is also not sustainable Under Section 70 of the U P Co-operative Societies Act only a dispute relating to constitution management or business of a co-operative society amongst members past members and persons claiming through members, between members and the society between different societies and between society and its committee or officer, can be settled Interveners are not the members of the co-operative society and the dispute which is being raised by interveners does not concern the constitution management or business of the co-operative society

7 The allegations of the interveners are that the plaintiff petitioner has filed the suit by impleading his own man as defendant It is always desirable that in a suit controversy should be finally settled and possibility of obtaining collusive decree should as far as possible be excluded by impleading the persons whose claims appear to be just and proper

In my opinion the court below was fully justified to implead the interveners

This writ petition lacks merit and is dismissed

Petition dismissed

1991 ALL L J 634

K P SINGH AND K K BIRLA, JJ

Smt Sheelawati and others, Appellants v Delhi Transport Corporation and others, Respondents

F A F O No 578 of 1980, D/ 25 10 1990*

(A) Motor Vehicles Act (4 of 1939), S 110-

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* Against judgment and decree of I P Singh Motor Accident Claims Tribunal, Distt Judge, Ghaziabad, D/ 21 5 1980

B — Compensation — Loss of consortium — Death of one spouse — Living spouse is entitled to compensation for loss of consortium

(Para 7)

(B) Motor Vehicles Act (4 of 1939), Section 110-CC — Interest — Should be awarded from date of petition and not from date of judgment

(Para 8)

(C) Motor Vehicles Act (4 of 1939), Section 110 B — Compensation — Assessment of — Deduction on account of gratuity, Provident fund and Insurance money cannot be allowed

(Para 9)

(D) Motor Vehicles Act (4 of 1939), Section 110-B — Compensation — Personal expenses of deceased — Calculation — Division of whole income equally amongst members of family of deceased — Normally, not a proper criterion

It is common knowledge that earning member, if in service in some office, has to go to and come from the office He has to spend several hours per day in the office His personal expenses, what may be called as pocket expenses, will not only be more than the minor dependant but also more than the adult dependants Therefore, normally to divide the whole income equally amongst the members of the family of the deceased may not be a proper criterion In the instant case the family of the deceased consisted of himself, his wife and four minor children The income was Rs 417/ per month only In the facts and circumstances of the case, therefore, he must be spending about 1/3rd of the income upon himself and he must be contributing 2/3rd of his income for expenses towards other family members Therefore, his contribution towards each of the claimants would come to Rs 668/- per annum

(Para 10)

(E) Motor Vehicles Act (4 of 1939), Section 110-B — Compensation — Deduction on account of lum-sum payment — There cannot be any hard and fast rule — Amount coming to share of claimant not much — Four of the claimants were minor — Rate of interest awarded was 6% only — On facts, held, deduction of 1/6 on account of lum sum payment was proper

(Para 11)

Cases Referred Chronological	**Paras**
AIR 1988 Raj 191 1988 ACC CJ 962	7
1987 ACC CJ 7 (1988) 1 Gauhati LR 446 (FB)	9
1987 ACC CJ 113 (1987) 2 TAC 68 (Raj)	7 11
1979 ACC CJ 84 1970 TAC 136 (Orissa)	11
1977 All WC 629 1977 TAC 452	10
1976 ACC CJ 407 (1976) 12 Delhi LJ 280	9 10
1975 ACC CJ 56 ILR (1975) 2 Delhi 791	9
1973 ACC CJ 515 (Delhi)	11
1972 ACC CJ 334 ILR (1974) 1 Punj & Har 677	9

Jagdish Prasad for Appellants N Lal for Respondents

K K BIRLA, J — Both these F A F Os arise out of the same award given by the Motor Accident Claims Tribunal and are being disposed of by a common order

2 Sri Rajeshwar Prasad Tyagi was employed as Sub-Station Attendant in the Hydel Department Ghaziabad U P At about 4 00 p m on 28-10 1977, while he was going to attend to his duties, he met with an accident by Bus No DHP 2470 driven by Sri Prakash respondent No 2 owned by Delhi Transport Corporation and died on the spot Smt Sheelawati is the widow and petitioners Nos 2 to 5 are the minor daughters and son of the deceased They have preferred the claim

3 According to the claimants case Sri Rajeshwar Prasad Tyagi was coming on the bicycle on the Patri of the road from the Meerut side while the bus was going towards Meerut side and the driver tried to overtake a Motorcycle by driving at high speed In the process it hit the cycle and dragged the deceased and the cycle to some distance resulting in the death of Sri Rajeshwar Prasad

Tyagi on the spot. The claimant filed a claim for Rs 2 36 000/-. The Tribunal found the accident on account of rash and negligent driving by the driver. This finding has not been challenged before us. After considering the evidence and the circumstances of the case the Tribunal found that the amounts payable to each of the claimants would be as given below.

He accordingly passed an award dated 21 5 1980 granting these amounts alongwith the interest at the rate of 6% per annum from the date of the judgment till the date of payment. Being aggrieved by this award the claimants have preferred F A F O No 575/80 and Delhi Transport Corporation F A F O No 673/1980.

4 After taking into consideration what amount he would have got at the time of the retirement the learned Tribunal held annual Income to be Rs 5009 10. The family consisted of himself his wife unmarried minor daughters and unmarried minor son. He divided the amount by six. Thereby according to the Tribunal 5/6 Income was to be spent equally on each of the claimants (that is Rs 634 00 per annum). He was further of the opinion that Km Manju Km Baby Km Anju and Master Titu were to get the benefit for 9 13 18 and 13 years respectively. He further awarded Rs 4000/- as marriage expenses for each child. According to him Smt Sheelawati Devi might have got the benefit for 24 years during the service of the deceased and for 12 and half years thereafter. He also awarded Rs 600/- per claimants on another ground. The period for which each of the claimants were to be benefited in case the deceased remained alive has not been challenged nor the award of Rs 4000/- per claimants on two counts as mentioned above has been challenged before us. According to the Corporation the amount of Insurance gratuity pension etc should have also been taken into consideration and the compensation should have been reduced. This contention was not accepted by the Tribunal. The Tribunal reduced the 1/6th of the compensation amount of lump sum payment. After calculating the compensation in the light of the above the Tribunal found each of the claimants to be entitled to the amount as mentioned above.

5 In F A F O No 578/1980 preferred by the claimants it has been contended that Smt Sheelawati Devi widow was deprived of the company of her husband and as such the amount by way of loss of consortium should have been granted Rs 50 000/- has been claimed in the petition towards the same. The other contention was that the interest should have been awarded from the date of the petition and not from the date of judgment. The Delhi Transport Corporation (hereinafter referred as the Corporation) has challenged the award mainly on three grounds namely firstly that the amount of insurance gratuity provident funds etc should have been considered and the compensation amount should have been accordingly reduced secondly that the claimant would have spent half of the income on himself and as such the deduction of 1/6th income only on that account is wrong and thirdly that at least 1/3rd deduction should have made on account of lumpsum payment.

6 We have heard the learned counsel for the parties and perused the records.

1	Smt Sheelawati	Rs 31610-5268	=	Rs 26342 00
2	Km Manjoo	Rs 12106-2017	=	Rs 10089 00
3	Km Baby	Rs 15442-2573	=	Rs 12869 00
4	Master Titu	Rs 15442-2573	=	Rs 12869 00
5	Km Anjoo	Rs 19612-3268	=	Rs 16344 00
			Total	Rs 78513 00

7 In the petition Rs 10 000/ has been claimed for loss of consortium No amount has been awarded by the Tribunal This matter has not been at all considered by him In our opinion, it is quite established that in case of the death of the one spouse, living spouse is entitled to compensation for the loss of consortium Such compensation has been awarded in the cases of National Insurance Co Ltd v Tulsi Devi 1988 Acc CJ 962 (AIR 1981 Raj 191) and Sohan Lal v Bal Swaroop Bal Bhatnagar 1967 Acc CJ 113, therefore some comepnsation should have been awarded under this head The amount will vary according to the facts and circumstances of each case Considering the facts of the case and the age of the deceased we are of the opinion that Rs 10 000/ should be awarded as compensation under this head to Smt Sheelawati Devi

8 As regards the question of interest under Section 110 of the Old Motor Vehicles Act 1939 the interest admissible was from such date not earlier than the date of making the claim In the instant case the accident took place in October 1977 There appears no reason why the interest should have not been awarded from the date of the petition We therefore find that interest should have been awarded from the date of the petition and not from the date of the judgment

9 The contention of the learned counsel for the Corporation is that on account of the death of the victim the claimants have become entitled to the gratuity Provident fund and Insurance money and as such this amount will amount to the benefit derived by the claimants on account of death of Sri Rajeshwar Prasad In our opinion the contention of the learned counsel for the Corporation cannot be accepted The learned Tribunal has itself cited some cases that is, 1972 ACC CJ 334 (Punj and Hary) Damanti Devi v Sita Devi 1975 ACC CJ 56 (Delhi) Bhagwanti Devi v Ish Kumar and 1976 ACC CJ 407 (Delhi) Prem Devi Pandey v Dayal Singh in which deduction on account of gratuity pension Provident fund and Insurance was not allowed Therefore the contention raised on behalf of the respondent is without any force Moreover the matter also stands concluded by the Full Bench decision in the case of Seminder Kuar v Union of India 1987 ACC CJ 7 (Gauhati) In this case it has been held that

Family Pension The widow of a Government employee would be entitled to family pension under the service conditions We do not think that it is a benefit received by the widow and the wrong doer should be allowed to take advantage of the family pension and again by it

Provident Fund, Pension or Gratuity Provident Fund, or pension, or gratuity are deferred payment of satisfactory service, savings and contributions of the deceased employee These amounts his family would have in any case been entitled to get whether the employee died a natural death or died in an accident They ought not to be taken into consideration for determining the taken into consideration as they can not be termed as pecuniary benefits

Life Insurance Payment received for life insurance cannot also be considered as a benefit received by the widow or dependants of the deceased. Insurance money was payable because premiums were paid by the deceased and a contract wa entered into for such payment on death The tort feasor cannot be permited to gain by the deduction of the insurance policy amount.

We therefore, find that the deduction as claimed by the Corporation on this ground was rightly rejected by the learned Tribunal

10 The next point for consideration is whether the deduction of 1/6th of the income towards the expenses incurred by the deceased on himself is proper or not The Tribunal has relied on the case of Prem Devi Pandey v Dayal Singh reported in 1976 ACC CJ 407 (Delhi) wherein whole income of the family was divided equally amongst the members of the family of the deceased However in the case of Smt Devki Devi Tiwari v Raghunath Sahai Chatroth reported

in 1977 All WC 629 half of the amount of the earning was taken to have been spent by the deceased in maintaining himself There can be no hard and fast rule in this regard It is common knowledge that earning member, if in service in some office has to go to and come from the office He has to spend several hours per day in the office His personal expenses, what may be called as pocket expenses will not only be more than the minor dependant but also more than the adult dependants Therefore, normally to divide the whole income equally amongst the members of the family of the deceased may not be a proper criterion In the instant case the family of the deceased consisted of himself, his wife and four minor children The income was merely Rs 417/ per month only In the facts and circumstances of the case therefore, in our opinion he must be spending about 1/3rd of the income upon himself and he must be contributing 2/3rd of his income for expenses towards other family members Therefore, his contribution towards each of the claimants would come to Rs 668/ per annum

11 Lastly the Tribunal has given a deduction of 1/6th on account of lump sum payment relying on the case of Sundari Devi v Dilip Kumar Sabat reported in 1979 ACC CJ 84 (Orissa) On the other hand, the contention of the learned counsel for the Corporation is that these deductions on this ground are generally allowed by the Courts from 25 percent to 30 percent. In the case of Mohinder Kaur v Manphool Singh reported in 1973 ACC CJ 515 (Delhi) 30 percent deduction was allowed on account of lump sum payment In the case of Sohan Lal (1987 ACC CJ 113) (Raj) (supra) 25 percent deduction was made on account of lump sum payment But the Division Bench did not allow this deduction on account of the fact that there had been a steep fall in the value of rupee and also there had been inflation and rise of prices It has been held that "thus it can be said that at one time the deduction of some amount from the compensation on account of uncertainties of life and lump sum payment was considered proper but fall in the value of rupee and the rising inflation has led the courts to take a view that deductions should not be made from compensation payable to the claimants It may be stated that the effect of rising prices and inflation is felt when the compensation payable is paid after a long time In several cases the period between the date of the submission of the claim and the date on which the compensation is actually paid to the claimants is more than a decade, during which the economic situation in the country undergoes a vast change If the compensation awarded is paid to the claimants soon after the decision of the Claims Tribunal, then the effect of the fall in the purchasing power of the money will not be as deep rooted as it would be if the money is paid after ten years when the appeal is decided Hence some significance is to be attached to the time when the compensation is actually paid to the claimants after the submission of the claim " Thus again there cannot be any hard and fast rule The matter should be judged from the facts and circumstances of each case In the instant case, the amount coming to the share of the claimants is not much Four of the claimants were minor The rate of interest awarded was 6 per cent per annum only In the circumstances we are of the opinion that no interference is called for in the deduction made on this account and the contention raised on behalf of the learned counsel for the Corporation is accordingly rejected

12 The total compensation of each of the claimants calculated in the light of the above discussions will be as below

1	Smt Sheelawati Devi	Rs 37,626 00
2	Km Manju	Rs 10,612 00
3	Km Baby	Rs 12,684 00
4	Master Titu	Rs 12,684 00
5	Km Anju	Rs 16,626 00

After deducting 1/6th of the same for the lump sum payment and uncertainties of life this will come to as below

1	Smt Sheelawati Devi	Rs	31 354 00
2	Km Manju	Rs	8 843 00
3	Km Baby	Rs	10 570 00
4	Master Titu	Rs	10 570 00
5	Km Anju	Rs	13 853 00
	Total	Rs.	75 190 00

13 The appeals are partly allowed. The award passed by the Claims Tribunal is modified to the extent that the claimants shall be entitled to Rs 75 190 00 (Rupees seventy five thousand one hundred and ninety only) as compensation from the Opposite party Delhi Transport Corporation together with interest at the rate of 6 per cent per annum from the date of the petition till the date of payment in the proportion given below

1	Smt Sheelawati Devi	Rs	31 354 00
2	Km Manju	Rs	8.843 00
3	Km Baby	Rs	10 570 00
4	Master Titu	Rs	10 570 00
5	Km Anju	Rs	13 853 00
	Total	Rs.	75.190 00

14 A copy of this judgment be placed on the file of F A.F O No 673 of 1980

Appeals partly allowed

1991 ALL. L J 639

B P JEEVAN REDDY, C J AND
R A SHARMA, J

M/s Shree Gopal Trading Co and others, Petitioners v State of U P and others, Respondents

C M W P No 12922 of 1989, D/ 12 3-1991

(A) Essential Commodities Act (1955) Ss 3, 5 — U P Foodgrains (Procurement and Regulation of Trade) Order (1982), Clause 4 (As amended in 1989) — Reduction in maximum limit of stock dealer can keep — Amended clause does not violate Arts 14 and 19(1)(g).

Constitution of India, Arts. 14, 19(1)(g)

Clause 4 of the U P Foodgrains (Procurement and Regulation of Trade) Order 1982 as amended by Ninth Amendment Order 1989, reducing the maximum limits of stock of foodgrains which dealer can keep is not violative of Arts. 14 and 19(1)(g) of the Constitution Control Order has been issued under the Essential Commodities Act and is an anti hoarding measure so as to prevent speculative business and black marketing in foodgrains Stock limit of foodgrains which a dealer can have is fixed for checking the hoarding so as to ensure availability of foodgrains for equitable distribution at a fair price and such a measure is essential in public interest and cannot be said to be arbitrary or unreasonable restriction on fundamental right to carry on a business AIR 1982 SC 33 followed

(Paras 4 5)

(B) Essential Commodities Act (1955), Ss 3, 5 — U.P Foodgrains (Procurement and Regulation of Trade) Order, (1982), Clause 4, sub-cls.(1) and (2) (as amended in 1989) — Words "each day" in sub-cl (2) mean "at any given time in a day" — Only limitation is that dealer should not have foodgrains in his stock at "any one time in a day" more than that specified by sub-cl (1)

Constitution of India, Arts. 14, 19(1)(g)

It is true that sub-cl. (1) of Cl. 4 of the Control Order uses the words "at a time while in sub-cl (2) each day has been used Sub-cl (2) is not happily worded and if read by itself it is likely to have the effect of crippling the business of the dealers and this will go beyond the object of the Control Order Control Order is only regulatory in nature and not prohibitory and it cannot be read in a manner so as to unreasonably restrict the fundamental right guaranteed by Arts. 14 and 19(1)(g) of the Constitution of India. Both these sub-clas. (1) and (2) as such have to be read together Reading these sub-clauses together it is apparent that while purchasing, selling or storing for sale a dealer cannot at any one time in a day exceed the limit specified by sub-cl (1) This means that a dealer can enter into a series of transactions resulting in sale and purchase of more than that specified by sub-cl (1) in a day subject to the condition that at any given time in a day he cannot have foodgrains in his stock more than that specified by sub-cl (1) AIR 1982 SC 29 Foll (Para 8)

(C) Essential Commodities Act (1955), Ss 3, 5 — U P Foodgrains (Procurement and Regulation of Trade) Order (1982), Clause 4, Explanation — Quantities of wheat meant for despatch to be included in stock limit of wholesaler, commission agent — Explanation not ultra vires power of State Government

Explanation appended to Cl 4 of the Control Order whereby quantities of wheat meant for despatch to outside the place of his business by wholesaler/commission agent kept at the premises of a transport/forwarding agency or at a railway station have been declared to be included in his stock limit for so long as that quantity or wheat is not loaded for the place of destination in a truck or any other mode of transport or railway wagon cannot be said to be ultra vires the power of State Government Dealers have means and capacity to manipulate the market and create artificial scarcity by withholding stock of foodgrains Explanation has been enacted in the Order to check evasion/violation of stock limit specified by Control Order The Control Order is an anti hoarding measure, so as to prevent black marketing and speculation in business of foodgrains Explanation prevents foodgrain dealers from hoarding foodgrains in other godowns, established or opened in the name of some trasnport or forwarding agency Intention is that no dealer should keep at any time in his stock foodgrains in excess of limit specified by sub cl (1) either directly or indirectly

Cases Referred Chronological	**Paras**
AIR 1982 SC 29 (Foll)	4, 7
AIR 1982 SC 33 (Foll)	4, 7, 8
AIR 1982 SC 130	4 7

Sunil Ambwani, for Petitioners, Standing Counsel, for Respondents

R A SHARMA, J — Petitioners are dealers engaged in the business of purchase, sale or storage for sale of foodgrains Sale, purchase and storage are regulated by Control Order known as U P Foodgrains (Procurement and Regulation of Trade) Order 1982 (hereinafter referred to as Control Order) issued by Government of U P under the Essential Commodities Act Clause 4 of the Control Order which specify limits of stock which dealer can keep was amended by its ninth amendment of 1989 known as U P Foodgrains (Procurement and Regulation of Trade) (Ninth Amendment) Order 1989 By this amendment the limit of stock was reduced to 150 quintals Amended Clause 4 is reproduced below

4 (1) No retail wholesaler, commission agent or manufacturer shall at a time have in his stock foodgrains in excess of the limits specified below

(One) Wheat —

(a) Retail	50	quintals
(b) wholesaler	150	quintals
(c) Commission agent	150	quintals
(d) Manufacturer	A quantity corresponding to the 7 days manufacturing capacity	

(Two) Other foodgrains as specified in Clause 11 of the Uttar Pradesh Foodgrains Dealers (Licensing and Registration on Hoarding) Order, 1976 from time to time

(2) No retailer wholesaler, commission agent shall purchase sell or store for sale wheat each day in quantities exceeding the limits specified in sub-clause (1) for each of them

(3) No wholesaler, commission agent and manufacturer, shall despatch his wheat or from any place other then the place of his business except in special circumstances and with the prior permission of the Controller

(4) Above stock limit shall not be applicable for such stock of wheat which is purchased by the commission agent under the price

support scheme for any purchasing agency appointed as such by the State Government

Explanation — Quantities of wheat meant for despatch to outside the place of his business by wholesaler commission agent kept at the premises of a transport forwarding agency or at a railway station shall be deemed to be included in his stock limit for so long as that quantity of wheat is not loaded for the place of destination in a truck or any other mode of transport or railway wagon

Petitioners have by means of this writ petition challenged the validity of the aforesaid Clause 4

2 The Government has filed a counter affidavit and petitioners have filed rejoinder affidavit in reply thereto We have heard learned counsel for the petitioners and learned standing counsel The writ petition is being disposed of in accordance with Rules of the Court

3 Learned counsel for the petitioners has challenged the newly added clause 4 of the Control Order on the ground that it is violative of Arts 19(1)(g) and 14 of the Constitution of India.

4 Control Order has been issued under the Essential Commodities Act and is an anti hoarding measure so as to prevent speculative business and black marketing in foodgrains Stock limit of foodgrains, which a dealer can have, is fixed for checking the hoarding so as to ensure availability of foodgrains for equitable distribution at a fair price, and such a measure is essential in public interest and cannot be said to be arbitrary or unreasonable restriction on fundamental right to carry on a business In M/s Krishna Lal Praveen Kumar v State of Rajasthan AIR 1982 SC 29, the Supreme Court upheld the provision of identical Control Order issued by the Government of Rajasthan fixing limit of stock at 200 quintals and plea of Art 19 was rejected Relevant passage from this judgment is quoted below (at p 31 of AIR)

The notification providing for the maximum quantity of wheat which may be possessed by any dealer at any one time is clearly designed to prevent hoarding of foodgrains and is certainly a reasonable restriction within the meaning of Art. 19(6) of the Constitution

To the same effect is the decision of Supreme Court in another case from Rajasthan of Surajmal Kailash Chandra v Union of India, AIR 1982 SC 130 These decisions were followed by Supreme Court in the case of M/s Bishambhar Dayal Chandra Mohan v State of U P , AIR 1982 SC 33 In the case of M/s Bishambar Dayal Chandra Mohan (supra), which is from State of U P while upholding the stock limit of 250 quintals and dealing with the plea of violation of Art 19(1)(g) of the Constitution the Supreme Court observed as follows (at p 50 of AIR)

"It cannot be asserted that the restriction imposed by the State Government on wholesale dealers of wheat is either arbitrary or is of an excessive nature The fixation of the stock limit of wheat to be possessed by wholesale dealers, at any time, at 250 quintals is an important step taken by the State Government to obviate hoarding and black-marketing in wheat which is in short supply It is hardly necessary to emphasise the extent and urgency of the evil sought to be remedied thereby Perhaps fixation of the maximum limit of wheat permitted to be possessed by a wholesale dealer at 250 quintals, at a time, is too low, but the restriction so imposed cannot be treated to be arbitrary or of an excessive nature beyond what is required in the national interest It is matter of common knowledge that wholesale dealers of foodgrains mainly operate in large cities and towns and have the means and capacity to manipulate the market by withholding stocks of a commodity There was need to check such speculative tendencies in the trade It was therefore, felt expedient to re-fix the stock limit of wheat for wholesale dealers at 250 quintals at a time, as in the case of commission agent The underlying idea is that the wholelsale dealers should be allowed to continue their trading activities within reasonable limits "

After having observed, as above, the Supreme 2

Court relying on its earlier two decisions of Rajasthan, M/s Krishna Lal Praveen Kumar and Surajmal Kailash Chandra (AIR 1982 SC 29) (supra) rejected the plea of violation of fundamental right conferred by Art. 19(1)(g) of the Constitution While negativing the plea of violation of Art 14 the Supreme Court observed as follows (at Pp 50-51 of AIR 1982 SC 33)

> The State Government has adopted various measures in the interest of the general public for the control of production, supply and distribution of and trade and commerce in, essential commodities To obviate hoarding and blackmarketing in foodstuffs, it has promulgated the Order It introduces a system of checks and balances to achieve the object of the legislation i e to ensure equitable distribution and availability of essential commodities at fair prices It cannot be said that looking to the prevailing conditions, the imposition of such restrictions does not satisfy the test of reasonableness Nor can it be said that the fixation of such stock limit is arbitrary or irrational having no nexus to the object sought to be achieved and is, therefore, violative of Art 14 On the contrary the limitation imposed fixing a stock limit for a wholesale dealer at 250 quintals is a reasonable restriction within the meaning of Art 19 (6) of the Constitution "

5 In view of the aforesaid decisions of the Supreme Court it cannot be said that the Control Order fixing maximum limit of stock of foodgrains which a dealer can have is violative of Arts 14 and 19(1)(g) of the Constitution

6 In this connection learned counsel for the petitioners has further submitted that in view of the sub-clause (2) of Clause 4 of the Control Order it is not possible to purchase, sell or store for sale in a day more than 150 quintals of wheat as specified by sub-clause (1), with the result that a dealer with average working of about 22 days in a month after excluding holidays etc can hardly have an income of about three to four thousand per month which would not be even sufficient to meet the cost incurred by a dealer for running a shop i e maintenance salary of the employees etc On this basis learned counsel submits that impugned clause 4 of the Control Order has the effect of crippling the business of the petitioners and is violative of fundamental right to carry on trade and business conferred by Art 19(1)(g) of the Constitution of India

7 If sub-clause (2) of clause 4 of the Control Order is read alone the apprehension of the petitioners may be said to be justified, but if read alongwith sub clause (1) the position becomes different. Sub-clause (1) of Clause 4 lays down that no wholesaler or commission agent shall at a time have in his stock foodgrains in excess of specified limit For wheat 150 quintals is the limit specified for wholesaler and commission agent In the case of Krishna Lal Praveen Kumar, AIR 1982 SC 29 (supra) identical provisions of Rajasthan Control Order were interpreted by the Supreme Court as follows (at p 31 of AIR)

> "The notification merely fixes maximum limit of 200 quintals of wheat to be possessed by a dealer at any one time. At any one time can only mean at only given point of time It does not mean that if a dealer was in possession of 200 quintals at 10 a m and sold 120 quintals between 10 a m and 12 noon he is barred from purchasing 120 quintals after 12 noon so as to make up the 200 quintals All that is necessary is that he should not have in his possession at any one time more than 200 quintals "

This decision was followed by Supreme Court in another Rajasthan case of Surajmal Kailash Chandra (AIR 1982 SC 130) (supra) and in the case of M/s Bishambar Dayal (AIR 1982 SC 33) (supra) where the Supreme Court while interpreting the U P Control Order laid down that 'at any time' means 'at any given time', which means that the wholesale dealer cannot have, in his stock, more than specified quintals at a time, but that does not prevent him from entering into a series of transactions during the course of a day

8 It is ture that sub-clause (1) uses the words at a time while in sub-clause (2) each day has been used Sub-clause (2) is not happily worded and if read by itself it is likely to produce the result which has been complained of by learned counsel for the petitioners But this sub-clause (2) cannot be read in isolation and is to be read with sub-clause (1) which has specified the limit of stock Reading these sub-clauses together it is apparent that while purchasing selling or storing for sale a dealer cannot at any one time in a day exceed the limit specified by sub-clause (1) But that does not prevent him from entering into a series of transactions during the course of the day resulting in sale and purchase of more than 150 quintals of foodgrains provided each transaction relates to and involves a quantity not exceeding 150 quintals The only limitation is that he should not at any one time in a day have more than 150 quintals in his possession If these sub-clauses are read otherwise they will convey conflicting meaning and will produce contrary result incapable of being reconciled with each other Fundamental right to carry on trade and business conferred by Art 19(1)(g) of the Constitution is subject to reasonable restriction which may be imposed by the State under Clause 6 of the same Article But these restrictions should not be arbitrary or of excessive nature The State although having the right to regulate the trade and business cannot adopt regulatory measure which would cripple the fundamental right to trade or business and freedom of trade Supreme Court in the case of Bishambar Dayal (AIR 1982 SC 33) (supra) while upholding the stock limit of 250 quintals at a time has observed it too low' even though dealer was not prevented from entering into series of transactions during the course of the day resulting in sale and purchase of more than 250 quintals in a day Unless both sub-clauses (1) and (2) of Clause 4 are read together in the manner suggested hereinbefore sub-clause (2) is likely to have the effect of crippling the business of the petitioners and this will go beyond the object of the Control Order Control Order is only regulatory in nature and not prohibitory and it cannot be read in a manner so as to unreasonably restrict the fundamental right guaranteed by Arts 14 and 19(1)(g) of the Constitution of India Both these sub-clauses (1) and (2) as such have to be read together This means that a dealer can enter into a series of transactions resulting in sale and purchase of more than 150 quintals in a day subject to the condition that each transaction relates to and involves a quantity not exceeding 150 quintals But at any given time in a day he cannot have more than 150 quintals of foodgrains in his stock Although fixing stock limit at 150 quintals is low but cannot be said to be arbitrary and unreasonable as in view of reading sub-clauses (1) and (2) together as observed hereinabove the petitioners can carry on their business within reasonable limit

9 Learned counsel for the petitioners also attacked the Explanation appended to Clause 4 of the Control Order whereby quantities of wheat meant for despatch to outside the place of his business by wholesaler/commission agent kept at the premises of a transport/forwarding agency or at a railway station have been declared to be included in his stock limit for so long as that quantity of wheat is not loaded for the place of destination in a truck or any other mode of transport or railway wagon Learned counsel for the petitioners has submitted that this explanation has unnecessarily placed unwarranted restriction on petitioners right to carry on trade or business, as after the wheat is given to the transport company/forwarding agency or railway station for transportation to the purchaser it ceases to be part of his stock It is not possible for us to agree with the learned counsel for petitioners. Dealers have means and capacity to manipulate the market and create artificial scarcity by withholding stock of foodgrains Explanation has been enacted in the Order to check evasion/violation of stock limit specified by Control Order As mentioend hereinbefore the Control Order is an anti hoarding measure, so as to prevent black marketing and speculation in business of foodgrains Explanation prevents foodgrain

dealers from hoarding foodgrains in other godowns established or opened in the name of some transport or forwarding agency Intention is that no dealer should keep at any time in his stock foodgrains in excess of limit specified by sub-clause (1) either directly or indirectly Explanation as such cannot be said to be ultra vires the power of State Government

10 Writ petition lacks merits and is dismissed, subject to the observations mentioned hereinbefore In view of facts and circumstances of the case there shall be no order as to costs

Petition dismissed

1991 ALL. L. J 644

B P JEEVAN REDDY, C J
AND R A SHARMA, J

Ram Surat Tiwari, Petitioner v State of U P and others, Respondents

C M W P No 13270 of 1990, D/ 4-4 1991

(A) U P Excise Act (4 of 1910), S. 3(2)(iv) — U.P Excise Rules, 1910, R 680 — Licence for wholesale vend of denatured spirit — Levy of fee — Ad valorem rate on sale made by distillery to licensee — Fee raised from 25% to 40% advalorem — Is excessive and exhorbitant and cannot be sustained

Constitution of India, Art. 265

The levy of fee for a licence for wholesale vend of denatured spirit at the rate of 40% advalorem on the sale made by the distillary to the licensees is excessive and exhorbitant It is obvious that this levy was imposed so as to recover the price of the privilege and the benefit granted to the wholesale dealers by the Government The rate of fee specified for recovering the price or consideration for transfer of right or privilege cannot be said to be regulatory It is highly excessive and exhorbitant and cannot be sustained

AIR 1990 SC 1927, AIR 1965 SC 1107, AIR 1971 SC 1182, 1978 All LJ 1112, Rel on (Paras 10, 12)

Although, the State cannot tax industrial alcohol but it can regulate it so as to prevent its misuse Licence and permits are well recognised modes of regulation of a trade or business and the power to regulate by licence includes the power to charge licence fee 'Licence Fee' does not necessarily mean 'fee' for service When the State makes the law for regulation of any trade or business by means of licensing, it is open to it to charge licence fee to defray the cost of administering the regulation In these cases although the principles of quid pro quo do not apply, but the fee so charged should have broad co-relationship with the cost of administering the regulation What is essential is that fee should not be excessive or exhorbitant (Paras 4, 6)

(B) U P Excise Act (4 of 1910), S. 3(2)(iv) — U.P Excise Rules, 1910, R 680 — Licence for wholesale vend of denatured spirit — State Government cannot charge purchase tax on industrial alcohol

(Para 11)

Cases Referred Chronological	**Paras**
AIR 1990 SC 1927 (Rel on)	4, 6
1978 All LJ 1112 AIR 1978 All 529 (Rel on)	7 10
AIR 1971 SC 1182 (Rel on)	4, 5, 8, 9
AIR 1965 SC 1107 (Rel on)	4, 5
AIR 1939 PC 36 1938 AC 708 107 LJPC 115	4

Mukesh Prasad, for Petitioner Standing Counsel, for Respondents

R A SHARMA, J — Petitioner is holding F L 16 licence for whole sale vend of ordinary denatured spirit having strength of 93 39% V/V, which is unfit for human consumption By this writ petition he has challenged the enhancement of licence fee by the impugned notification dated 29 1 1990 and has also prayed for writ of mandamus directing the respondents not to realise purchase tax and ad valorem licence fee and not to stop supply of ordinary denatured spirit for non payment of purchase tax and ad valorem licence fee At the time when the writ petition was filed this court passed the following interim order

'Pending further orders of this Court respondents are directed to supply ordinary denatured spirit to the petitioner on payment of licence fee at the rate of 25% of the ad valorem on sale made by the distillery to him So far as purchase tax is concerned, there shall be no stay pending further orders of this Court "

State has filed a counter affidavit and in reply thereto the petitioner has filed a rejoinder affidavit A supplementary affidavit on behalf of the State and a supplementary rejoinder affidavit in reply thereto by the petitioner have also been filed The writ petition is being disposed of in accordance with the Rules of the Court

2 Rule 680 of U P Excise Rules, which authorises the Collector to grant F L 16 licence for the whole sale vend of denatured spirit provided for levy of fee for such licence at the rate of 15% ad valorem on the sale made by a distillery to the licensee This rate of 15% was by subsequent amendment raised to 25% and by the impugned notification it has further been raised to 40% ad valorem

3 Learned counsel for the petitioner has attacked the levy on the ground that the State Government has no right to levy licence fee on industrial alcohol and in any case there is no quid pro quo and the levy is highly excessive and exhorbitant. Learned Standing Counsel on the other hand has tried to justify the levy both on the ground of right of State to impose such a levy as well as on the ground of principles of quid pro quo

4 The Supreme Court in the case of Synthetics and Chemical Ltd v State of U P, AIR 1990 SC 1927, has laid down that State does not have power to legislate in respect of non-potable alcohol, and the imposition of taxes and other similar levy on such alcohol by the State is unconstitutional and ultra vires, as this power belongs to the Union of India. Supreme Court has, however, in the said case made it clear that the State may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol and further in case the State is rendering any service, it may charge fee based on quid pro quo In this connection paragraph 85 of the judgment is quoted below

"The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act After the amendment the State is left with only the following powers to legislate in respect of alcohol

(a) it may pass any legislation in the nature of prohibition of potable liquor referable to Entry 6 of List II and regulating powers

(b) it may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol

(c) the State may charge excise duty on potable alcohol and sales tax under Entry 52 of List II However sales tax cannot be charged on industrial alcohol in the present case, because under the ethyl alcohol (price control) orders, sales tax cannot be charged by the State on industrial alcohol

(d) however, in case State is rendering any service, as distinct from its claim of so-called grant of privilege it may charge fee based on quid pro quo See in this connection, the observations of India Mica's case AIR 1971 SC 1182 (supra) "

In paragraph 87 of the judgment the same thing was restated as follows

"We are clearly of the opinion that in respect of industrial alcohol the States are not authorised to impose the impost they have purported to do In that view of the matter, the contentions of the petitioners must succeed and such impositions and imposts must go as being invalid in law so far as industrial alcohol is concerned. We make it clear that this will not affect any impost so far as potable alcohol as commonly understood is concerned It will also not affect any imposition of levy on industrial alcohol fee where there are circumstances to establish that there was quid pro quo for the fee sought to be imposed This will not affect any regulating measure as such

Although the State cannot tax industrial alcohol but it can regulate it so as to prevent its misuse Licence and permits are well recognised modes of regulation of a trade or business and the power to regulate by licence includes the power to charge licence fee Licence fee does not necessarily mean fee for service As observed by the Supreme Court in the case of the Corporation of Calcutta v Liberty Cinema AIR 1965 SC 1107 there is difference between the Fee and Licence fee and it is open to the State to charge licence fee to meet the cost incurred in regulation of any trade or business or for raising revenue or for both Paragraph 8 of the aforesaid judgment being relevant, is reproduced below

"This contention is not really open to the respondent for S 548 does not use the word Fee, it uses the words Licence fee and those words do not necessarily mean a fee in return for services In fact in our constitution fee for licence and fee for services rendered are contemplated as different kinds of levy The former is not intended to be a fee for services rendered This is apparent from a consideration of Art 110(2) and Art 199(2) where both the expressions are used indicating thereby that they are not the same In Shannon v Lower Mainland Dairy Products Board 1938 AC 708 AIR 1939 PC 36 it was observed at pp 721 722 (of AC) (at pp 38 39 of AIR)

"If licences are granted it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the province or for both purposes It cannot as their Lordships think be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue

It would, therefore, appear that a provision for the imposition of a licence fee does not necessarily lead to the conclusion that the fee must be only for services rendered "

Generally licensing system is adopted and the licence fee is charged (i) for collection of revenue (ii) for regulation and for raising of revenue (iii) for granting any benefit or privilege to a person to exploit the properties of the Government which otherwise he could not have done under the law, (iv) for rendering service and (v) for regulating any trade or business When the object of the licensing is to collect revenue and regulation is only incidental devised as a means to collect revenue licence fee in such case is a tax and not fee However if the object of the licence is both regulation and collection of revenue there is substantial element of regulatory measure involved and in such cases fee is charged for meeting the cost of regulation as well as for earning revenue Licence fee for parting with the privilege and conferring it on the licensee is not a fee but a price for the right or the privilege transferred by the State to the licensee When licence fee is charged for service rendered it is a fee in true sense of term In such cases although the principles of quid pro quo with arithmetical exactitude are not necessary to be established broad co relationship between the amount charged and the service rendered is required to be maintained The position is different when the licensing system is adopted and licence fee is charged for the purpose of regulating any trade business or industry Here the sole object is to regulate certain activities and the fee is charged to defray the cost of administering the regulation In such cases the object is neither to collect revenue nor to charge the price for some right or privilege

5 Although it is open as mentioned above for the State to regulate any trade or business by means of licence and to charge licence fee in connection therewith but in such cases principles of quid pro quo do not apply as by regulating the trade or business the State is not rendering any service to the licence holders but enforcing the regulation by placing restrictions on their rights to trade and business for the good of the society By exercising the control on the activities of the licensees, State makes their activities subject to reasonable restrictions which is not a

service rendered to them Object of law which places restrictions on the fundamental right to trade and business, is not to confer any benefit on those, whose rights are being regulated but to regulate their activities in the interest of general public As observed by the Supreme Court in Indian Mica and Nicanite Industries Ltd v State of Bihar AIR 1971 SC 1182

"The requirement to take a licence is prescribed to safeguard public interest and not as a source to gather revenue What is made punishable is either a persons' failure to take the required licence or the breach of the conditions of the licence Otherwise there would be no sanction behind the rule requiring to take a licence Generally speaking by granting a licence the State does not confer any privilege or benefit on any one All that it does is to regulate a trade, business or profession in public interest

To the same effect are the observations made by the Supreme Court in the case of the Corporation of Calcutta v Liberty Cinema (AIR 1965 SC 1107) (supra) wherein it has been mentioned that inspection of cinema houses by officials is not service to the licensees, as the object of the inspections is to control the licencee's activities and to make him observe the conditions of the licence

6 When the State makes the law for regulation of any trade or business by means of licensing it is open to it to charge licence fee to defray the cost of administering the regulation In these cases although the principles of quid pro quo do not apply, but the fee so charged should have broad co-relationship with the cost of administering the regulation What is essential is that fee should not be excessive or exhorbitant This is clear from paragraph 62 of the decision of the Supreme Court in the case of Synthetics and Chemical Ltd v State of U P (AIR 1990 SC 1927) (supra), the relevant passage from which is quoted below

"We are of the opinion that we need not detain ourselves on the question whether the States have police power or not We must accept the position that the States have the power to regulate the use of alcohol and that power must include power to make provisions to prevent and/or check industrial alcohol often being used as intoxicating or drinkable alcohol. The question is whether in the garb of regulations a legislation which is in pith and substance, as we look upon the instant legislation, fee or levy which has no connection with the cost or expenses administering the regulation, can be imposed purely as regulatory measure Judged by the pith and substance of the impugned legislation, we are definitely of the opinion that these levies cannot be treated as part of regulatory measures "

Hon ble Oza, J in the concurrent judgment in the aforesaid case had also laid down the same principles in paragraph 105 of the judgment, relevant extract of which is reproduced below —

"In our opinion, therefore, so far as the present case is concerned the State in exercise of powers under Entry 2 of List II and by appropriate law regulate and that regulation could be to prevent the conversion of alcoholic liquors for industrial use to one for human consumption and for purpose of regulation, the regulatory fees only could be justified. In fact, the regulation should be the main purpose, the fee or earning out of it has to be incidental and that is why the learned Counsel appearing for the State attempted to use this terminology saying that the purpose is regulation, the earnings are incidental but frankly conceded that in fact the earnings are substantial."

7 In the instant case the imposition of fee under Rule 680 was upheld by this court in the case of State of U P v M/s Agarwal Spirit Supply Co, 1978 All LJ 1112 (AIR 1978 All 529) on the ground that it is a price or consideration for the grant of privilege of the wholesale vend by the State Government to the licensee The relevant passage from this decision is reproduced below

"In our view both the charges mentioned in sub-rule (1) or sub-rule (2) constitute the fee payable for the licence Sub-rule (1) prescribes the scale of fees, while sub-rule (2) provides another manner of fee so payable. Both kinds of fee are payable as condition to the grant of the licence, i e for parting with the right of wholesale vend

xxx xxx xxx xxx

The label of vend fee attached by sub rule (2) is neither material nor decisive to judge its true nature and character Since the fee charged under sub-rule (2) is at the time of issue of denatured spirit from a distillery, that is to say it is payable at the time of sale by the distillery it has been called a vend fee It is an integral part of the scheme of the rental or consideration for the grant of the privilege "

Such a fee, which is the price charged by the Government for parting its right or privilege in favour of the licensee, cannot be said to be regulatory fee

8 In the supplementary affidavit filed on behalf of the State of U P an attempt has been made to show that State Government is spending huge amount in running the Excise department In this connection learned standing counsel has invited our attention to paragraph 10 of this affidavit in which it has been mentioned that large number of officials have been appointed for potable and non potable alcohol so as to supervise the production, distribution and delivery of denatured alcohol to different units and for regulation and supervision of distilleries and the industrial units as well as licensees like the petitioner and for this purpose the State is incurring annual expenditure of about Rs 8 crores for maintaining the Excise Department Where only about Rs. 70 lakhs are collected from the petitioner and other licensees like him. In this manner the State has tried to show that it is spending much more than the collection made by it. The petitioner has, however, denied these allegations and it has further been argued on his behalf that in view of the case of Indian Mica and Micanite Industries Ltd. v State of Bihar (AIR 1971 SC 1182) (supra) the cost of supervising the manufacturing process and the subsequent transfer of the denatured spirit cannot be recovered from licensees as they had nothing to do with the manufacturing process and the employment of elaborate staff by the Excise department for various other purposes The relevant extract from the said judgment of the Supreme Court. relied upon by the learned counsel for the petitioner is quoted below (at p 1187 of AIR)

"According to the finding of the High Court the only services rendered by the Government to the appellant and to other similar licensees is that the Excise department have to maintain an elaborate staff not only for the purposes of ensuring that denaturing is done properly by the manufacturer but also for the purpose of seeing that the subsequent possession of denatured spirit in the hands either of a whole sale dealer or retail seller or any other licensee or permit holder is not misused by converting the denatured spirit into alcohol fit for human consumption and thereby evade payment of heavy duty So far as the manufacturing process is concerned, the appellant or other similar licensees have nothing to do with it They are only the purchasers of manufactured denatured spirit Hence the cost of supervising the manufacturing process or any assistance rendered to the manufacturers cannot be recovered from the consumers like the appellant Further under rule 9 of the Board's Rules, the actual cost of supervision of the manufacturing process by the Excise department is required to be borne by the manufacturer There cannot be a double levy in that regard In the opinion of the High Court the subsequent transfer of denatured spirit and possession of the same in the hands of various persons such as whole sale dealer, retail dealer or other manufacturers also requires close and effective supervision by cause of the risk of the denatured spirit being converted into potable liquor and thus evading heavy duty Assuming this conclusion to be correct by doing so, the State is rendering no service to the consumer It is merely protecting its own rights "

9 In the aforesaid case of India Mica and Micanite Industries Ltd v State of Bihar (AIR 1971 SC 1182) the question as to whether the State can charge fee for regulation and if

so to what extent was neither raised nor decided. This is clear from paragraph 2 of the judgment wherein it has been observed as follows

> 'The High Court has come to the conclusion that the levy made under the impugned rule is a fee That finding was not challenged before us by any of the parties Therefore all that we have to see is whether the fee levied is within the permissible limit In other words whether there is sufficient quid pro quo for the levy in question "

Although what was charged in that case was licence fee but the case was decided as if it is fee for service rendered and in that connection the observations contained in the passage reproduced herein above were made by the Supreme Court But even in cases where the licence fee is charged for administering the regulations, a broad correlationship between the fee charged and the probable amount spent in administration of the regulation has to be maintained In this connection also some of these observations of the Supreme Court are relevant in order to find out whether the amount which is charged as licence fee for regulation of the trade and business is not excessive or exhorbitant and has a reasnable correlationship with the amount spent by the State in regulating activities

10 The expenses of Rs 8 crores for maintaining the Excise Department cannot be recovered by the State Government only from the licensees like the petitioner Excise department of the State is not meant for regulating the activities of these licensees only as its activities extend to much wider areas covering various fields with which the persons like the petitioner have nothing to do The Government was in a position to place the material before this court to show the probabale cost of administering the regulations and its correlationship with the licence fee realised but the Government has failed to do so and has not established even on broad basis the correlationship between the amount spent and the fee charged The levy of fee at the rate of 40% ad valorem on the sale made by the distillery to the licensees is excessive and exhorbitant It is obvious that this levy was imposed so as to recover the price of the privilege and the benefit granted to the wholesale dealers by the Government As is clear from the Division Bench Judgment of this Court in the case of State of U P v M/s Agarwal Spirit Supply Co (1978 All LJ 1112) (supra) The rate of fee specified for recovering the price or consideration for transfer of right or privilege cannot be said to be regulatory It is highly excessive and exhorbitant and cannot be sustained

11 A Division Bench of this court has already held that State Government cannot charge purchase tax on the industrial alcohol

12 The writ petition is accordingly allowed with costs. The impugned Notification dated 20-1 1990 is quashed. The respondents are directed not to realise purchase tax and ad valorem licence fee and not to stop supply of denatured spirit to the petitioner for non payment of purchase tax and ad valorem licence fee It is however, open to the State to adopt regulatory measure and prescribe fee to defray the cost of administering the regulation within a period of six months from today and during this period the interim order dated 17 8-1990 extracted above. shall continue

Petition allowed

1991 ALL L J 649

D S SINHA J

Dr Devesh Maurya and another, Petitioners v Principal M L N Medical College, Allahabad, Respondent.

Civil Misc Writ Petn No 31329 of 1990, D/ 14-3-1991

Constitution of India, Art 226 — Joinder of parties — Petition challenging admission list of Medical College — Students admitted and pursuing studies in terms of admission

list — Non joinder of such students — Petition was liable to be dismissed, for nonjoinder of necessary parties

Civil P C (5 of 1908), O 1, R. 10

(Paras 2 and 3)

S P Singh for Petitioners Standing Counsel for Respondent

ORDER — By means of this petition under Art 226 of the Constitution of India Dr Devesh Maurya and Dr S P Singh urge that this Court may issue a writ order or direction in the nature of certiorari to quash the order dt 20th Nov 1990 (Annexure 3 to the petition) which in substance is an admission list of the candidates selected for post graduate studies upon a competitive entrance examination held in the year 1990 The petitioners also pray for issuance of writ order or direction in the nature of mandamus commanding the respondent namely Principal, M L N Medical College, Allahabad to cancel the aforesaid order dt 28th Nov 1990 containing the admission list and to prepare a fresh list in pursuance of the government order dt 9th Oct 1990

2 It cannot be gainsaid that if the order dt 28th Nov 1990 containing the list of the students admitted to the post graduate Medical course of 1990 at M L N Medical College, Allahabad is quashed or cancelled the selected candidates who have already been admitted to the course and are indisputably pursuing their study since Dec 1990 will have to be thrown out and knocked of the Medical College The presence of these students before this Court is therefore, a must before any order of the kind prayed by the petitioners can be passed The said students who have already been admitted and whose names figure in the impugned order have not been impleaded in the petition This infirmity was pointed out to Sri Shiv Prakash Singh, the learned counsel for petitioners but the learned counsel chose to argue out the case, notwithstanding the infirmity of the absence of the persons likely to be affected in case the relief prayed for by the petitioners is granted to them He categorically indicated that petitioners would not implead the students whose names figure in the impugned order dt 28th Nov 1990 and who would, eventually be affected in case the court chose to strike down the said order

3 It is settled law that no order affecting a person can be passed in his absence and without giving him opportunity of defending himself

4 For the reasons stated in the foregoing paragraphs the court finds itself unable to grant the relief prayed for in the absence of the students named in the impugned order The petition therefore fails and is hereby dismissed summarily

Petition dismissed

1991 ALL L J 650

R P SINGH J

Devendra Nath Misra Petitioner v District Judge Pilibhit and another Respondents

Civil Misc Writ No 9917 of 1998 D/ 12 1 1990

(A) U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S 21(1)(a) — Eviction — Bona fide need — Application for release of accommodation filed by landlady — Prospective allottee could not be allowed to participate in proceeding

1986 All LJ 845 (FB) and (1982) 1 All Rent Cas 464 Rel on

(Para 7)

(B) U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S 21(1) — Eviction — Bona fide need — Rejection of application — Revision against — Revisional Court while allowing revision re assessing evidence and interfering on question of fact of bona fide need of landlady — Order liable to be set aside

Civil P C (1908), S 115

(Paras 6, 7)

Cases Referred Chronological	**Paras**
1986 All LJ 845 (1986) 1 All Rent Cas 1 AIR 1986 All 196 (FB) (Rel on)	7
(1982) 1 All Rent Cas 464 (Rel on)	7

Triloki Nath for Petitioner Standing Counsel for Respondents

ORDER — By means of this writ petition the petitioner has challenged the order passed by the District Judge Pilibhit allowing the revision after setting aside the order passed by the Rent Control and Eviction Officer and further releasing the disputed accommodation in favour of the landlady respondent No 2

2 Briefly the facts of the case are that the shop situate at J P Road in Pilibhit was in tenancy of one Sharafat Ullah who intimated to the Rent Control and Eviction Officer that he was going to vacate the said shop Respondent No 2 the landlady of the disputed accommodation then filed an application for release of the said accommodation while the petitioner filed an application for allotment of the said accommodation in his favour The Rent Control and Eviction Officer vide his order dated 4-1 83 holding that the need of the landlady for the disputed accommodation was not bona fide and genuine rejected her application for the release of the disputed accommodation and further holding that the accommodation was already in possession of the petitioner who was the only applicant for allotment of the same order the allotment of the disputed accommodation in favour of the petitioner The landlady respondent No 2 feeling aggrieved went up in revision before the District Judge who vide the impugned order allowed the revision after setting aside the order passed by the Rent Control and Eviction Officer and further ordered the release of the said accommodation in favour of the landlady respondent No 2 which order is in challenge in the present writ petition

3 Heard Sri Triloki Nath learned counsel for the petitioner and Sri Navin Sinha for the respondent

4 The learned counsel for the petitioner contended that the District Judge had no jurisdiction to re assess the evidence and interfere in finding of fact in revisional jurisdiction and hence the impugned order passed by him after re assessment of the evidence and interfering on the question of fact is liable to be set aside He further contended that the District Judge after allowing the revision could not himself order the release of the disputed accommodation vide the impugned order and hence also the impugned order passed by him is liable to be set aside

5 The learned counsel for the respondent on the other hand contended that the petitioner being a prospective allottee could not be allowed to participate in the proceedings for the release of the disputed accommodation and the Rent Control and Eviction Officer in allowing the petitioner who is a prospective allottee to participate in the proceedings regarding release of the disputed accommodation has clearly committed a manifest error of law and hence the order passed by the Rent Control and Eviction Officer is liable to be set aside He further contended that the need of the landlady respondent No 2 should have been decided on its own merit irrespective of the case set up by the prospective allottee regarding his possession in the disputed accommodation and the Rent Control and Eviction Officer in rejecting the release application on the ground that the petitioner is already in possession of the disputed accommodation and paying rent to the landlady and hence the need of the landlady for the disputed accommodation is not bondafide and genuine has wrongly rejected the release application after taking extraneous facts into consideration and hence the order passed by the Rent Control and Eviction Officer is liable to be set aside and in that view of the matter this Court should not interfere in the order passed in revision by the District Judge allowing the revision and ordering the release of the accommodation in favour of the landlady

6 After hearing the learned counsel for the parties and perusing the relevant order I find that while the order passed by the District Judge is vitiated in law as he has allowed the

revision on re-assessment of the evidence and interfering on the question of fact on the other hand, the order passed by the Rent Control and Eviction Officer is also liable to be set aside on the ground that the Rent Control and Eviction Officer has allowed the prospective allottee to participate in the proceedings for the release of the disputed accommodation From the perusal of the order passed by the District Judge I find that he has re-assessed the evidence and held that the Rent Control and Eviction Officer has not properly assessed the evidence and has taken into consideration photostat copies which are not admissible in evidence and on re-assessment of evidence he has held that the petitioner had colluded with the old tenant and moved the application for allotment and then entered in possession The District Judge held that in his opinion there was no reason to reject the assertion of the landlady about her bona fide need for the disputed accommodation In the result the District Judge allowed the revision after re-assessment of the evidence and then further he ordered the release of the disputed accommodation in favour of the landlady which is clearly vitiated and liable to be set aside

7 Now coming to the order passed by the Rent Control and Eviction Officer, I find that he has allowed the petitioner who is a prospective allottee to participate in the proceedings for the release of the disputed accommodation which is manifestly erroneous. It is well settled that a prospective allottee has no locus standi to contest the application for release filed by the landlady. See Talib Hasan v Ist Addl District Judge, Nainital, ((1986) 1 All Rent Cas 1 (1986 All LJ 845) (FB)) and Prem Chand Goyal v 1st A D J Dehradun, (1982) 1 All Rent Cas 464 The Rent Control and Eviction Officer after taking into consideration the application moved by the petitioner for the allotment of the disputed accommodation came to the conclusion that the landlady seems to be giving the accommodation on rent to various persons and has also allowed the petitioner to remain in possession and issue rent receipts in lieu thereof and in view of the same he held that the need of the landlady for the disputed accommodation is not bona fide and genuine and on this ground rejected the application for the release of the disputed accommodation This order passed by Rent Control and Eviction Officer is manifestly erroneous in view of the well settled view that the prospective allottee has no locus standi to contest the application for the release filed by the landlady The Rent Control and Eviction Officer should not have permitted the petitioner to participate in the proceedings for the release moved by the landlady and should have first decided the release application moved by the landlady on its own merits and only in case he had rejected the application for the release of the disputed accommodation, thereafter alone the Rent Control and Eviction Officer could consider the application for allotment moved by the petitioner and pass order in accordance with law In that view of the matter the order passed by the Rent Control and Eviction Officer is also liable to be set aside

8 In the result, I allow the writ petition and quash the orders passed by the District Judge and also passed by the Rent Control and Eviction Officer dated 10-8-83 and 4 1 83 respectively and remand the case to the Rent Control and Eviction Officer to decide the release application of the respondent No 2 in accordance with law in view of the observations made above Since the case is already very old pending since 1980, I direct the Rent Control and Eviction Officer to decide the case expeditiously and if possible within three months from the date of presentation of a certified copy of this order before him

9 The parties shall bear their own costs

Petition allowed

1991 ALL. L. J 653

R B MEHROTRA, J

Ram Dass Yadav, Petitioner v IVth Additional District Judge Jhansi and others, Respondents

Civil Misc Writ Petn No 13589 of 1990, D/- 22 10-1990

(A) U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S 21(1)(a) — Alternative accom-modation — Availability — Compromise decree between limited owner and landlord — Prescribed Authority looking into it for determining availability of accommodation — Does not amount to testing validity of the decree — No strained relation between landlord and limited owner — Alternative accommodation available in premises in possession of limited owner — No eviction

Where the landlord is seeking eviction on the ground of bona fide requirement, and he is said to possess a house in occupation of his relative having life interest in view of a compromise decree, the prescribed authority can look into the decree to determine the availability of alternate accommodation This will not amount to testing the validity of the decree Where the finding is that no strained relations are there between the reversioner and the person having life interest and that the landlord can accommodate himself in the house, he will not be entitled to claim eviction of tenant

(Paras 15 16 20)

(B) U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S 21(1)(a) — Bona fide need — Landlord failing to prove — Question of finding alternative accommodation by tenant is irrelevant

(Para 31)

Cases Referred	**Chronological Paras**
1990 All LJ 477 (1990) 1 All Rent Cas 592	27
1989 All LJ 255 (1989) 1 All Rent Cas 301	25
1989 All LJ 567 (1989) 1 All Rent Cas 523	25
1989 All LJ 1267 (1989) 2 All Rent Cas 344	18
(1989) 2 All Rent Cas 51 (1989) 2 Ren CR 311	29
1984 All LJ 256 (1984) 1 All Rent Cas 113	30
(1984) 1 All Rent Cas 339	26
1982 All Rent Cas 279 (1982) 2 Ren CJ 399	28
1982 All Rent Cas 396 1982 (UP) RCC 496	19
AIR 1981 SC 707 (1981) 2 SCC 103	17

B D Mandhyan for Petitioner Standing Counsel for Respondents

ORDER — By means of this petition under Art 226 of the Constitution the petitioner who is tenant of premises No 433 B Sunder Bhawan Sadar Bazar Jhansi, has challenged the order of Fourth Additional District Judge Jhansi, dated 15th May 1990 in R C Appeal No 2 of 1986 between Ajai Prakash Pateria and another v Ram Dass Yadav and others

2 Necessary facts giving rise to the present petition are that Sri Ajai Prakash Pateria and Sri Vijai Prakash Pateria, moved an application under S 21(1) of U P Act No 13 of 1972 with the allegation that they are the owners and landlords of the House No 433 B Sunder Bhawan Sadar Bazar Jahnsi and Ram Dass is tenant of the house at the rate of Rs 12 50 Paise per month Earlier this house was owned by Sri Ram Bahadur Ganga Sahai Mushaddi Khan On 13th November, 1980 this house was purchased by the present landlord by registered sale-deed of the same date The landlord respondent's case is that they are in the employment in Bharat Heavy Electricals Ltd. Jhansi (herein after referred to as BHEL') situate in Khailar They have not been allotted any house in the residential colony of BHEL The landlord further stated that at present they are living with their parents in house No 76-A Sadar

Bazar Jhansi This house in which landlord's parents are living is owned by Cantonment Board and their parents are only tenant of the house The landlord has a family of four members The applicant No 1 Ajai Prakash Pateria, his wife and five years old daughter and the applicant No 2 Smt Vijai Prakash Pateria, who is unmarried The landlord served a notice on the tenant and the tenant having refused to vacate the premises moved an application before the prescribed authority under S 21(1)(a) of U P Act No 13 of 1972 (hereinafter referred to as an Act) for the release of the house on the ground of bona fide requirement

3-4 The present petitioner, the tenant of the premises in dispute contested the application and filed written statement contending therein that the need of respondent/landlord is not bona fide The petitioner tenant s had been living in the house in dispute for the last thirty years The landlord never applied for allotment of any house in BHEL, even though residential accommodation is provided by BHEL to accommodate their employees The respondents have wilfully not applied for the allotment of any house in the residential colony of BHEL for the purposes of digging out a ground for evicting the petitioner tenant

5 It was specifically contended in the written statement by the petitioner tenant that besides the house No 76 A, situate in Sadar Bazar Jhansi, where the landlord's parents are living There is another house No 41, situate in Hazaryana, Jhansi which is lying vacant and if the petitioner has any need of the house he could have occupied the said house No 41 situate in Hazaryana This house No 41 situate at Hazaryana consists of six rooms, courtyard latrine and bath room It was stated in the said written statement that the petitioner can comfortably accommodate himself in this house The petitioner tenant also contended that house No 76-A, where the petitioner's parents are residing consists of six rooms and the petitioner can comfortably live with their parents as they have no other child except the petitioner and only for two persons house No 76 A Sadar Bazar Jhansi is quite big enough where the petitioner s family can also be accommodated

6 This written statement was filed by the petitioner s tenant on 18th April 1984 Subsequent thereto Sri Ajai Prakash Pateria, who is one of the landlords of the premises in dispute filed his affidavit on 19th April 1984 stating that he has no concern with the house No 41 situate at Jaharyana, Jhansi and stated that he is not the owner of the said house neither he has any right over the said house the allegation of the petitioner tenant that the landlords are the owners of the house is patently incorrect This affidavit of Ajai Prakash Pateria has been filed as Annexure 3 to the writ petition Subsequent thereto another affidavit was filed on 13th August, 1984 in respect of the landlord s case by Sri Murlidhar, father of the landlord, wherein he also did not state that house No 41, Hazaryana Jhansi is not vacant or anybody else is residing in the said house

7 Subsequent to the filing of the aforesaid affidavit the petitioner tenant filed his affidavit again asserting that the landlords are the owners of house No 41 Hazaryana, Jhansi which is lying vacant and the landlord s need can be satisfied by occupying the said house It was also stated that alleged compromise decree in respect of House No 41 was collusive

8 In reply to this affidavit for the first time an affidavit was filed by the respondent's landlord on 10th October 1985 stating that not only that house No 41 Hazaryana, Jhansi does not belong to them but it is in occupation of the tenant Roop Narain In support of the aforesaid stand two more affidavits were filed by the landlord respondent, one of Roop Narain Shandilya who has stated that he is tenant of the house No 41, Hazaryana, Jhansi and the other affidavit was filed by one Sri Narain Dass, who is the owner of the house No 42, Hazaryana, saying that Roop Narain is not his tenant

9 Besides, above statement on oath some documents were also filed from both the sides in respect of the aforesaid house The petitioner tenant filed a copy of the voter list of the year 1984 where in Roop Narain Shandilya son of Sri Hajari Lal, was shown to be occupying house No 42 Hazaryana, Jhansi The respondent landlord filed three letters dated 26th September, 1980 12th November, 1980 and 22nd December, 1982 alleging to be written by the brother of Sri Roop Narain Shandilya, where in the address of Roop Narain Shandilya is mentioned as house No 41, Hazaryana, Jhansi and also a compromise decree between Murlidhar, the father of the petitioners and Smt. Kishori Devi, grand mother of the petitioners, wherein it was decreed that Smt Kishori Devi will be the owner of house No 41 through Murlidhar during her lifetime

10 In the first round of litigation between the parties the Prescribed Authority held that the genuineness of the compromise decree cannot be looked into in the proceedings under Rent Control Act and directed release of the accommodation in favour of respondent-landlord. Aggrieved thereby the petitioner filed appeal The appellate court allowed the appeal and remanded back the matter to the Prescribed Authority for adjudicating the need of the parties qua availability of house No 41, Hazaryana, Jhansi to the landlord and examine the genuineness of the compromise decree in respect of the said house

11 On remand the Prescribed Authority held that the compromise decree was collusive between the parties and was obtained for the purpose of evicting the present tenants, after purchasing the house in dispute The Prescribed Authority also held that house No 41, Hazaryana, Jhansi continues to be joint family property and the respondent landlord has a right of residence in the said house The circumstances which the Prescribed Authority took into consideration for arriving at the said findings are summarised hereunder

(1) That decree is a compromise decree between mother and son

(2) Since the plaint and the written statement has not been filed it is not clear as to whether the house in dispute was a Hindu joint family property, it is also not clear that what properties have been divided amongst coparceners and in what manner?

(3) The compromise decree is only in respect of house No 41 which says that Smt Kishori Devi is declared to be owner and in possession of house No 41, Hazaryana, Jhansi through the defendant namely Murlidhar she may continue to live in the house during her lifetime but will have no right to transfer it, and after the death of Smt. Kishori Devi Lalit Prakash Pateria, minor will be owner of the house and the defendant will have no right in it The decree makes it clear that in respect of house No 41 Hazaryana, Jhansi, Smt Kishori Devi was conferred only limited rights, she was authorised to remain in possession of the said house but she had no right to transfer the same

12. On the basis of the said decree the Prescribed Authority came to the conclusion that Smt. Kishori Devi cannot be held to be absolute owner of house No 41, Hazaryana, Jhansi The most important aspect of the matter which has been emphasised by the Prescribed Authority after the remand is that even though the court may not be competent to look into the validity of a compromise decree in Rent Control proceedings, but the Rent Control Authorities can always consider that the accommodation falling in share of a family member on the basis of the said compromise decree which is alleged to be collusive is available for accommodating the landlords comfortably In the aforesaid background the Prescribed Authority looked into the circumstances regarding the question of landlords being accommodated in house No 41, Hazaryana, Jhansi despite the said compromise decree and held that landlords can accommodate themselves in house No 41, Hazaryana Jhansi, despite the said compromise decree

13. Thereafter the Prescribed Authority considered the question as to whether house No 41 Hazaryana, Jhansi is vacant or is occupied by the tenant Sri Roop Narain as such is not available for satisfying the need of the respondent landlord The Prescribed Authority on considering the evidence of the parties recorded the finding that Sri Roop Narain is not occupying, house No 41 Hazaryana, Jhansi, as tenant

14 Aggrieved by the aforesaid judgment the respondent landlord filed appeal The appellate court allowed the appeal and held that the genuineness of compromise decree cannot be looked into in the Rent Control proceedings and also held that house No 41 Hazaryana, Jhansi was in occupation of Sri Roop Narain Shandilya as such was not available to respondent landlord, for satisfying their bona fide need of a residence

15 Aggrieved by the said decree the petitioner tenant has filed the present writ petition

16 Two questions arise for consideration in the present matter

(i) Whether it was permissible for the Prescribed Authority to examine the availability of accommodation in house No 41 Hazaryana Jhansi for satisfying the need of the respondent, despite the alleged compromise decree declaring Smt Kishori Devi (the grandmother of the respondent landlord) to be limited owner of the said house

(ii) Whether house No 41, Hazaryana, Jhansi was in occupation of Sri Roop Narain Shandilya as tenant

I will deal with the first question, first, Assuming that the Prescribed Authority had no jurisdiction to look into the validity of the said decree but the Prescribed Authority had every right to look into the circumstances of availability of the house for the respondent landlord, who were grand-sons of the aforesaid Smt Kishori Devi There is no case of any strained relationship between the grand mother and the grand daughter-in laws. There is no whisper as to why the present respondent landlords could not have resided with their grand mother if the said house is available There is no whisper as to why Smt Kishori Devi is not ready to accommodate her grand son even assuming that she is the owner of the said house All these factors could have been taken into consideration by the Prescribed Authority for adjudicating the genuineness and bona fide of the landlord's need The Prescribed Authority did not commit any mistake in taking these factors into account and coming to the conclusion that in the circumstances of the case the respondent landlords could have been accommodated themselves in house No 41, Hazaryana, Jhansi, if the same was vacant and available despite the said compromise decree

17 The learned counsel for the respondent Sri B N Agarwal, has vehementally urged that even though in the earlier proceedings the Prescribed Authority was directed to consider the genuineness of the compromise decree the appellate court committed no mistake in taking a view that the validity of the compromise decree could not be looked into by the Prescribed Authority, as the view taken by the appellate court is in accordance with the decision of this court the first order of the appellate authority was only a remand order which is interlocutory in character, was not necessarily to be challenged in the High Court at that stage, as held in the case of (1981) 2 SCC 103 (AIR 1981 SC 707), Kshitish Chandra Bose v Commr of Ranchi, so no interference is called for in the appellate court's impugned judgment, taking a view that the genuineness of the decree cannot be looked into

18. The counsel for the respondents then placed reliance on a decision of this Court reported in (1989) 2 All Rent Cas 344 (1989 All LJ 1267), Khem Chand v IV Addl District Judge, Bulandshahr In this decision it has been held that the validity of the decree passed by the Civil Court cannot be challenged in colateral proceedings.

19 On the other hand learned counsel for the petitioner has placed reliance on a decision of this Court reported in 1982 All Rent Cas 396 Manohar Lal v District Judge, where in this Court has held that the question of title of accommodation is not decisive in this matter It is not inflexible rule that in considering the need of the landlord, only accommodation which can be taken into consideration is that which is owned by him The court held that the appellate court was not justified in law in thinking that the accommodation of the father could never be considered as available to his son

20 Thus the question which require consideration is regarding judging the scope of bona fide of respondent landlord qua availability of accommodation for accommodating them in house No 41 Hazaryana, Jhansi in the light of the said compromise decree of a court The Prescribed Authority was justified in looking into these circumstances and coming to the conclusion that despite a decree of the court in the circumstances of the case landlord can avail of the accommodation available in the disputed premises, subject matter of the decree, and this will not amount to adjudicating the validity of a decree In this view of the matter I am clearly of the opinion that in the circumstance of the present case the prescribed authority was wholly justified in judging the need of the respondent landlord taking into consideration the nature of the compromise decree on the basis of which Smt Kishori Devi is said to be owner of the house in dispute and coming to the conclusion that the respondent landlord can accommodate themselves in the said house, despite the said decree

21 The other question which arise for consideration in the present case is regarding the fact as to whether house No 41, Hazaryana, Jhansi was vacant on the date the respondent landlord moved application or the same was in occupation of a tenant The Prescribed Authority on examining the evidence led by the parties, came to the conclusion that the house No 41, Hazaryana, Jhansi, was not occupied by Sri Roop Narain Shandilya, as a tenant The reasons given by the Prescribed Authority in coming to the said conclusion are as under —

(1) That the petitioner tenant has stated in the very beginning in his written statement that the house No 41 Hazaryana, Jhansi is an ancestral property of the respondent landlord which consisted of six rooms, a latrine courtyard, bath room and the need of the respondent landlord can be suitably adjusted in the said house In this connection the respondent landlord in their affidavit dated 19th April 1984 and in the affidavit of their father namely Sri Murlidhar on 13th August, 1984 did not say that the said house is in occupation of Roop Narain Shandilya as tenant but only took a stand that the respondents are not the owner of the said house The respondents were mainly relying on the compromise decree referred to earlier in the judgment However, subsequently for the first time in the affidavit dated 10th October 1985 the respondents have taken a stand that Sri Roop Narain Shandilya is a tenant of the house in dispute This seems to be an after thought and is liable to be rejected on this ground alone

(2) Sri Roop Narain Shandilya has stated in his affidavit that he is tenant of Smt Kishori Devi and has been paying rent to her through Sri Murlidhar Pateria but no document worth the same has been filed by the respondents for proving the tenancy between Smt. Kishori Devi and Sri Roop Narain Shandilya Neither there is any rent deed nor receipt showing the payment of rent by Sri Roop Narain Shandilya, to Smt Kishori Devi The respondent-landlord has not produced any ration card or copy of the voter list to prove the tenancy of Sri Roop Naram Shandilya in house No 41 Hazaryana Jhansi

(3) That the only documentary proof which the respondent landlord has filed for proving that the said house is in occupation of Sri Roop Narain Shandilya are three letters addressed to Sri Roop Narain Shandilya, which shows that he was residing in house No 41, Hazaryana, Jhansi Only on the basis of these letters it cannot be said that Sri Roop Narain Shandilya, was occupying the house

as tenant The inference drawn by the Prescribed Authority on the basis of aforesaid letters was that it may be that Sri Roop Narain Shandilya was occupying the house on behalf of its owners but that does not prove that Sri Roop Narain Shandilya became tenant of the house

(4) That the petitioner have filed certified copy of the voter list wherein Sri Roop Narain Shandilya has been shown to be occupying the house No 42 Hazaryana Jhansi and normally the presumption of correctness is attached in respect of the voter list, as such, there is no reason to discard the same The Prescribed Authority refused to accept the statement given on oath by Sri Roop Narain Shandilya and Sri Narain Dass, who claimed himself to be the owner of the house No 42 Hazaryana, Jhansi and stated that Sri Roop Narain Shandilya was not his tenant These affidavits were filed to nullify the voter list filed by the petitioner

22 Taking in to account all the aforesaid factors the prescribed authority came to the conclusion that Sri Roop Narain Shandilya was not occupying the house as tenant

23 The appellate court reversed the finding of the prescribed authority mainly on the ground that the letters filed by Sri Roop Narain Shandilya are of the year 1980 and there is no justification for disbelieving those letters which prove that Roop Narain Shandilya is living in house No 41, Hazaryana Jhansi and the same is not vacant

24 Sri B D Mandhyan learned counsel appearing on behalf of the petitioner has vehementally attacked the approach of the appellate court, and submitted that the appellate court has not given any reason for discarding the finding of the Prescribed Authority holding that the landlord has failed to prove that Sri Roop Narain Shandilya, was tenant of the premises in dispute The only finding recorded by the appellate court is that Sri Roop Narain Shandalya is living in the said house The said finding is not enough for judging the need of the respondents landlord. The nature of possession of Sri Roop Narain Shandilya was necessarily to be enquired in to by the appellate court and the appellate court could have held the need of the respondents landlord bona fide only on coming to the conclusion that Sri Roop Narain Shandilya is tenant of Smt Kishori Devi and occupying the house No 41 Hazaryana, Jhansi as tenant of the house Merely on the basis of occupation of Sri Roop Narain Shandilya, it cannot be said that the house No 41 Hazaryana, Jhansi was not vacant The contention of Sri Mandhyan is that if the said occupation of Sri Roop Narain Shandilya was either illegal or was permissive then the landlord's need could have been considered from different angle qua the availability of house No 41, Hazaryana Jhansi for accommodating the landlord

25 In support of his contention learned counsel for the petitioner has placed reliance on the decision of this Court reported in (1989) 1 All Rent Cas 523 (1989 All LJ 567) Arun Kumar Solanki v VIII Addl District Judge Agra and (1989) 1 All Rent Cas 301 (1989 All LJ 255) Munni Devi v Radha Devi In the aforesaid decision it has been held that Sections 11 and 13 of U P Act No 13 of 1972 (hereinafter referred to as Act) is a complete code in itself and no one can be held to be tenant except in accordance with the procedure contemplated by the aforesaid two sections If any person is occupying an accommodation either without getting the said accommodation released in accordance with the provisions of the Act or getting the same allotted in accordance with Section 16 of the Act, he is not entitled to claim himself to be tenant Of course an exception to the aforesaid general rule has been carved out under Section 14 of the Act but in the present case since Sri Roop Narain Shandilya, claimed himself to have become tenant only from the year 1980, Section 14 permits regularisation of occupation of a person with the consent of the landlord, only up to the date of 5th July 1976 So Section 14 of the Act is not attracted in the present case

26. Sri Mandhyan, submitted that without

an allotment order occupation of Sri Roop Narain Shandilya is only that of an unauthorised occupant and the respondents landlord was under an obligation to get the aforesaid unauthorised occupant evicted from the premises for satisfying his need instead of moving an application for evicting the petitioner tenant from the premises in dispute According to Sri Mandhyan this fact itself shows that the need of respondents landlord is not bona fide Sri Mandhyan has also cited decision of this court reported in (1984) 1 All Rent Cas 339 Km Madhu Saxena v Ist Addl. Distt. Judge Rampur wherein this Court took a view that if finding of fact is recorded under misapprehension then such finding cannot be accepted as a finding of fact and can be interfered with by the court in exercise of its jurisdiction under Art 226 of the Constitution

27 Learned counsel for the respondents Sri B N Agarwal equally vehementally opposed this submission and have argued that in these proceedings landlords were not required to prove that Sri Roop Narain Shandilya was occupying the premises as tenant and Sri Roop Narain Shandilya as well as the respondents landlord both have sworn on affidavit that Sri Roop Narain Shandilya is occupying house No 41 Hazarvana, Jhansi as tenant and the appellate court having believed their testimony there is no justification for this court to interfere with the findings of fact arrived at by the appellate court In support of this contention Sri Gupta has cited (1990) 1 All Rent Cas 592 (1990 All LJ477) Ram Kumar v Shanker Lal wherein this court has held

"That the court while exercising jurisdiction under Art 226 of the Constitution has only a supervisory power and cannot act as a court of appeal The court laid down that while exercising jurisdiction under Art. 226 of the Constitution the court has only to see whether there is any error apparent on the face of record

28 Sri Agarwal have also submitted that even if there are some irrelevant consideration in the appellate court s judgment, the same should not be quashed only on the said ground This court should see the over all appraoch of the court and should also look into the circumstances of the case before interfering in the findings of appellate court For the aforesaid proposition Sri Gupta has placed reliance on the case reported in 1982 All Rent Cas 279 Govind Ram v II Addl District Judge wherein this Court has held

The finding which has been recorded leaving aside certain irrelevant matter is a finding of fact and no such ground has been made out by the petitioner which may entail any interference in the said finding by this Court

29 Sri Agarwal thereafter contended that in the facts of this case this court should not interfere as the landlord cannot be deprived of his own house There is no justification for this Court in interfering with the judgment of the appellate court by which the only house belonging to the respondents landlord has been released in their favour Sri Gupta has placed reliance on a decision of this Court reported in (1989) 2 All Rent Cas 51 Divalumal v III Addl District Judge wherein this Court has held

It is true that tenant if evicted from the accommodation in question will be put to some difficulties But that by itself is not a ground to deprive the landlord of the house of his accommodation which he purchased 9½ years ago for his own use and occupation with his growing family

30 Sri Gupta also submitted that the release application was filed in the year 1980 and ten years has lapsed thereafter The petitioner tenant has not made any attempt to get any house allotted. This itself is a good ground for allowing the respondents landlord's request for release of the premises. In support of the aforesaid contention reliance was also placed on the case reported in (1984) 1 All Rent Cas 113 (1984 All LJ 256) N S Dutta v VII Addl District Judge Allahabad wherein this Court has held that

"The Court is entitled also to take into account the fact that the tenant has neither alleged nor proved to have made effort to have an alternative accommodation Moreover non availability of accommodation to the tenant is in itself not adequate ground to reject the landlord s application

Sri Agarwal contended that since the petitioner has not made any effort for getting a house allotted, as such there is no justification for not allowing the release application of the landlord

31 This aspect of the matter, however, has no relevance on the question of bona fide need of the respondent s landlord If the respondent s landlord fails to satisfy his bona fide need, the question of finding alternative accommodation by the tenant is wholly irrelevant The only question which requires consideration in the present matter is bona fide need of the respondent landlord qua availability of house No 41 Hazaryana Jhansi and the nature of occupation of Sri Roop Narain Shandilya

32 Having careful consideration of the aforesaid contention I am of the opinion that the appellate court has recorded a finding accepting Sri Roop Narain Shandilya a tenant of the premises on the basis of affidavit filed by respondent landlord Sri Narain Das and Sri Roop Narain Shandilya and the three letters addressed to Sri Roop Narain Shandilya at 41 Hazaryana Jhansi

33 So far as Sri Narain Das is concerned, his affidavit only goes to prove that Sri Roop Narain Shandilya is not his tenant, as he is owner of house No 42 Hazaryana, Jhansi So far as the affidavit of Sri Roop Narain Shandilya and the respondent landlord are concerned they also do not prove that Sri Roop Narain Shandilya was residing as tenant of Smt Kishori Devi is house No 41, Hazaryana, Jhansi The prescribed authority was justified in taking a view that since neither any ration card nor any rent receipt have been produced by Sri Roop Narain Shandilya or the respondent landlord to prove the tenancy of Sri Roop Narain Shandilya in house No 41 Hazaryana, Jhansi It is not proved that Sri Roop Narain Shandilya was living as tenant in house No 41 Hazaryana Jhansi Moreover in this case Sri Roop Narain Shandilya in his affidavit has clearly stated that he has taken house in dispute on rent from Smt Kishori Devi Pateria It is admitted on record that by means of a compromise decree passed in Suit No 527 of 1981 decided on 17th December 1981 Ku Kishori Devi is alleged to have become its exclusive owner so on the basis of affidavit of Sri Roop Narain Shandilya it is clear that his tenancy must have come into existence after 17th December 1981 as such there is substantial force in the contention of Sri Mandhyan that assuming for the sake of argument Sri Roop Narain Shandilya was inducted by Smt Kishori Devi after 17th December 1981 The said induction was contrary to law and the occupation of Sri Roop Narain Shandilya was only that of trespasser The affidavit of Sri Roop Narain Shandilya is silent on the question as to from which date he became tenant of Smt Kishori Devi This silence in the affidavit of Sri Roop Narain Shandilya and the decree dated 17th December 1981 clearly prove that Sri Roop Narain Shandilya has some how occupied the house after 17th December 1981

34 In the aforesaid background the dates of the letters filed by Sri Roop Narain Shandilya for proving his house No 41, Hazaryana Jhansi are also relevant The date of the letter filed by the landlord for proving that Sri Roop Narain Shandilya was residing in house No 41 Hazaryana Jhansi are the letters dated 26 9 1980, 12 11 1980 and 22 12 1982 Atleast there is no explanation for the letters dated 26-9 1980 and 12 11 1980, on the own showing of Sri Roop Narain Shandilya he was inducted as tenant in the premises by Smt Kishori Devi who claims to be owner of house on the basis of compromise dated 17 12 1981 In these circumstances the letters filed by the respondent landlord do not prove that Sri Roop Narain Shandilya was occupying the premises as tenant

35 The genuineness of these letters become very much doubtful by mere circumstance that Sri Roop Narain Shandilya himself claimed to have become tenant only

after 17 12 1981 There is no explanation as to how these letters could have been sent on the address before the said date

36 The appellate court has laboured a lot in taking a view that since by means of a compromise decree house No 41 Hajaryana, Jhansi, fell in the share of Smt Kishori Devi respondents landlord has no connection with the same This aspect of the matter has been considered in earlier part of my judgment where I have held that the nature and circumstances of the said compromise decree were such that the prescribed authority could have looked into the nature of decree for the purpose as to whether the respondent landlord can be accommodated in house No 41 Hajaryana Jhansi

37 In view of the above discussions I am clearly of the opinion that the judgment of the appellate court is vitiated in law as it failed to appreciate the issues involved in the case and failed to consider the reasoning of the prescribed authority in coming to the conclusion that in the facts and circumstances of the case the need of the respondent landlord was not bona fide

38 Accordingly I allow the writ petition set aside the judgment of the appellate court dated 15th May 1990 and sent back the case to the appellate authority to decide afresh the question of bona fide need of the respondent landlord in the light of the observations made above so far as possible within a period of six months from the date of production of certified copy of this order by any of the parties

39 The parties shall bear their own costs

Petition allowed

1991 ALL. L. J 661

H C MITAL AND G D DUBE, JJ

Saeed Khan Appellant v State of U P, Respondent

Criminal Appeal No 1486 of 1978 D/ 4-1-1991 *

Penal Code (1860), S 300 — Murder — Dying declaration — Corroborated by medical evidence — Sufficient to prove offence — Presence of motive — Conviction of accused for murder — Proper

Evidence Act (1872), S 32

Where in a murder case the dying declaration recorded by a Magistrate on being satisfied that the deceased was in a fit mental condition at the time of making of the statement and he had obtained the certificate of doctor attending on him to that effect and the medical evidence also corroborated the dying declaration and there was also a motive for murder conviction of the accused on basis of such dying declaration would be proper

(Paras 11 20 24)

Cases Referred	**Chronological**	**Paras**
AIR 1985 SC 416	1986 Cri LJ 836	10
AIR 1976 SC 294	1976 Cri LJ 295	14

P N Lal for Appellant Dy Govt Advocate for State

G D DUBE, J — This appeal has been preferred against the judgment and order of Sessions Judge Rampur holding the appellant guilty of the offence under S 302 I P C, convicting the sentencing him to undergo life imprisonment

2 The case against the appellant is that Siraj Ahmad (deceased) and appellant Saeed Khan happened to be friends prior to the alleged occurrence They had developed some bad habits of committing unnatural intercourse with small boys The father of the deceased had chided Siraj Ahmad and asked him to avoid company of the appellant Consequently there was strained relation between the two It has been stated by the prosecution that at about 12 50 p m on 11th July 1987 Siraj Ahmad was going on a bicycle in Mohalla Pucca Bagh near the Dall Mill in the town of Rampur The appellant had asked Siraj Ahmad to get down from the bicycle When the appellant had refused and continued riding his cycle replying to the appellant that he had no time and had to go the appellant obstructed the way and tried to pull him down by catching the carrier of the cycle The appellant gave knife blow on his neck from behind as a result of which Siraj Ahmad fell down from the cycle Thereafter two more blows — one on the chest and another on the abdomen were inflicted with the knife The occurrence was said to have been seen by Shakeel Ahmad (PW 2) Lallan Khan (PW 3) They had carried the deceased on a rickshaw to Police Station Ganj A report of the incident was lodged by Shakeel Ahmad (PW 1) at 12 30 p m on 11-7 1977 same day Siraj Ahmad was alive at the time of report He had been taken to the District Hospital Rampur Dr U C Srivastava (PW 4) had examined the injuries of Siraj Ahmad at 12 45 noon same day on 11-7-1977 He had found the following six injuries on his person —

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* Against judgment and order of Shri Hukum Singh Sessions Judge Rampur, D/ 6-5 1978

1 Incised wound 6 cm x 2 cm depth of the wound could not be measured, on the left and outer side of the chest It was 7 cm lateral to left nipple

2 Incised wound 6 cm x 2 cm x depth not probed over outer aspect, back of left side of chest 8 cm below and back to injury No 1

3 Incised wound 1 cm x ½ cm x ½ cm on the left side chin, 3 cm below the left angle of mouth

4 Incised wound 5 cm x 1 5 cm x 2 cm on left side upper part neck 3 cm behind the left ear

5 Incised wound 4 5 cm x 1 5 cm x 2 cm deep on the left side back of neck 2 cm below injury No 4

6 Incised wound ½ cm x ½ cm skin deep on the middle part of outer border of left ear

3 At the time of examination Siraj Ahmad was unconscious His pulse was not palpable Blood pressure could not be measured Temperature was subnormal and the skin was cold and calmy The doctor had opined that injuries had been caused by some sharp edged weapon Injuries 3 and 6 were opined to be simple The remaining were kept under observation

4 The injured was admitted in the hospital The prosecution story is that a report (Ext Ka 5) was sent to S D M Sadar Rampur at 2 00 p m by Dr O N Gupta (PW 6) for recording dying declaration of Siraj Ahmad Thereupon Hem Chandra Mittal, Tahsildar Magistrate (PW 8) had recorded the statement of the deceased at 4 15 p m same day Siraj Ahmad died in the hospital at 12 20 a m in the night between 11th and 12th July, 1977

5 The investigation had been taken up by Bharat Singh Sub-Inspector (PW 20) He had recorded the statements of the witnesses at the police station and prepared site-plan (Ext Ka 17) on the spot On 12 7 1977 he had conducted inquest proceeding of dead body in the hospital He had prepared inquest report (Ext Ka 19) of the dead body at District Hospital, Rampur and sent the body for post mortem examination He had recorded the statements of the witnesses also The appellant was arrested same day i e 12-7 1977 at 6 00 p m near Bilrampur Gate The appellant had stated that he will hand over the knife (weapon of offence) and the clothes which he had been wearing at the time of occurrence Consequently the appellant went to Pahari Gate along with the I O and the recovery witnesses Ram Autar and Ghasita (PW 18) and brought out a blood stained knife (Ext 4) a blood stained pant (Ext 7) and bushirt (Ext 8) from a cluster of Nashal A memo (Ext Ka 23) was prepared at the spot After completion of investigation, charge sheet was submitted against the appellant

6 The post mortem had been conducted by Dr S K Agarwal (PW 1) at 12 30 p m on 12 7 1977 He found

very spot on which the injury was noticed by Dr U C Srivastava (PW 4) The doctor had found that sixth and ninth ribs below injuries 1 and 2 were cut The plura between the two injuries was also cut There was two pint of blood in the left chest cavity The lower lobe of the lung was also cut. The doctor had opined that the deceased had died about half a day before the post-mortem According to him, the injuries were sufficient in the ordinary course of nature to cause death

7 The prosecution had examined twenty witnesses in all. The appellant had pleaded not guilty to the charge He had stated that he had been falsely implicated in this case on account of enmity He had examined Udaivir Singh (DW 1), Deputy Jailor of the District Jail Rampur who had proved the entry of the appellant in the jail and the clothes which he was wearing at the time of his admission

8. The eye-witnesses of the occurrence had been declared hostile The learned Sessions Judge had believed the fact of recovery of the knife (Ext 4) on the pointing of the accused allegedly connecting it with the occurrence of this case The learned Sessions Judge also found the dying declaration reliable and relying upon his statement of the deceased recorded by the Tahsildar had held the appellant guilty of the offence under S 302 I P C

9 It has been urged by learned counsel for the appellant that the alleged motive was not such which would have prompted the appellant to commit the murder of the deceased Secondly, it was further urged that the dying declaration was not reliable According to this dying declaration, only three blows were inflicted by the appellant whereas the injury report and the post-mortem report indicate that the deceased had six injuries Thus the dying declaration is not corroborated by the medical evidence Our attention was drawn to the statements of the witnesses and urged that from the very place of occurrence till recording of the statements by the Magistrate there was tutoring of the deceased and therefore it was probable that the deceased had not made statement on account of his own free will Thirdly it was also contended that the deceased was not in such a fit mental condition as to be able to make a statement to the Magistrate It was argued that if the deceased was not in a fit mental condition and could not have made statement. the sole dying declaration cannot form basis of conviction

10 Learned A G A has drawn our attention to State of U P v Ram Sagar Yadav AIR 1985 SC 416 It was held in this case that a dying declaration can be acted upon without corroborated It was further held that not even a rule of prudence has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated

11 The dying declaration in this case was recorded by a Magistrate The Magistrate has stated that he had satisfied himself that the deceased was in a fit mental condition at the time of statement. He had obtained the certificate of the doctor attending on him that the maker of the statement was in a fit mental condition It is noteworthy that when injured Siraj Ahmad had been brought in the hospital at 12 45 noon on 11 7 1977, he was unconscious Dr U C Srivastava (PW 4) has stated that he had been with the injured up to 1 20 p m He had started the drip of glucose saline oxygen and injections of decadron and coramine were also given to the injured Dr O N Gupta (PW 7) had stated that at about 2 00 p m Siraj Ahmad was conscious He had written a note (Ext Ka-5) to the S D n Sadar Rampur for recording the statement of the injured It has been proved as Ext Ka 5 It reads as under

"Sir,

Kindly come for D D of Sri Siraj Ahmad, s/o Dunnan Khan, r/o Moh. Pakka Bagh, P S Ganj Distt Rampur admitted in serious condition in Distt Hospital in E.Wd on 11-7-77 at 12 45 p m

He is a case of M L. Inj

Thanks

Yours faithfully,
O N Gupta,
11-7-77
at 2 p m"

12 This witness has further stated that he had been present at the time of recording of the statement of Siraj Ahmad He had certified on the statement sheet that Siraj Ahmad was conscious and capable of making statement at the time of recording of the statement by the Magistrate He has also stated that as the drip of glucose was being administered through the veins of left hand the thumb-impression of right hand thumb was taken

13 A perusal of the post mortem report indicates that the brain was not at all affected by any one of the injuries Only the ribs and the lungs had been cut by the incised wounds Keeping in view all these circumstances and particularly the line of treatment given by the doctor attending on him it was most probable that the injured might have regained consciousness at 2 00 p m That is why the doctor had written to the S D M Sadar to record dying declaration No circumstance had been elicited from the cross examination of the three doctors examined in this case, viz, S K Agarwal (PW 1) Dr U C Srivastava (PW 4) and Dr O N Gupta (PW 7) that the injured could not have regained consciousness by the time the note (Ext Ka 5) was sent to the S D M Sadar We therefore, find no force in the contention of learned counsel for the appellant that Siraj Ahmad was not in a proper mental condition as to able to make statement

14 Learned counsel for the appellant has drawn our attention to the statements of Shakeel Ahmad and other witnesses for the purposes of showing that Siraj Ahmad was tutored by his associates to tell the Magistrate that Saeed Khan appellant had inflicted knife injuries on him This witness had been declared hostile by the prosecution The effect of this declaration by the prosecution was to avoid totally the statement of this witness In Sat Paul v Delhi Administration, AIR 1976 SC 294 it was held that even in a criminal prosecution when a witness is cross-examined and contradicted with a leave of the Court by the party calling him his evidence cannot, as a matter of law be treated as washed off the record altogether It is for the Judge of fact to consider in each case whether as a result of such cross examination and contradiction the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony The statement of this Shakeel Ahmad cannot be believed in view of the statement of Dr U C Srivastava When the injured had been admitted at 12 45 noon, he was unconscious The occurrence is said to have taken place at about 12 15 p m same day According to the prosecution this injured was being carried on a rickshaw by Shakeel Ahmad and his companion In such a circumstance it does not appear to be probable that within half an hour the tutoring would have started to implicate the appellant if a dying declaration was to be recorded At that time the anxiety of Shakeel Ahmad would have been to save the life of the victim

15 The statement of Shakeel Ahmad stands explained by the facts elicited from another hostile witness Subhan (PW 11) who stated in cross examination that while being taken on a rickshaw Shakeel Ahmad was asking Siraj Ahmad as to who had assaulted him Thus from the statements of these hostile witnesses it cannot be upheld that the witnesses had tutored Siraj Ahmad to implicate the appellant as the assailant

16 The Magistrate Hem Chandra Mittal has stated that he had removed all the persons present around Siraj Ahmad at the time of recording statement He admitted that there were only three or four persons present near Siraj Ahmad According to the doctor Siraj Ahmad was admitted in emergency ward Mohammad Ahmad (PW 6), father of the deceased had stated that when he reached the hospital on hearing the assault on his son he remained sitting in the verandah as the doctor had not permitted him to go inside This statement shows that when even father was not permitted inside the ward, none else would have been permitted to remain with the injured Hence any possibility of tutoring to the injured stands ruled out This statement has not been discredited by cross examination

or any other evidence It is therefore apparent that none had any occasion to tutor the deceased There is no force in this contention

17 The last contention regarding injuries is also not made out if we examine the injuries mentioned in the injury report (Ext Ka 3) with the dying declaration (Ext Ka 6) The dying declaration states that appellant Saeed had inflicted injuries on the back of his neck Injury No 4 is on the left side upper part neck 3 cm behind left ear and Injury No 5 is on the left side back of neck 2 cm below Injury No 4 The dying declaration does not say as to how many blows were inflicted on the neck Thus causing of the two injuries on the back can be said to have been stated in the dying declaration It was stated that one blow was given on the region near the arms on the chest The word "kokh has been used This corresponds to Injury No 1 measuring 6 cm. x 2 cm x depth not probed over front and outer aspect of left side chest The second injury was caused on the chest This injury on chest was found by the doctor as 6 cm x 2 cm x depth not probed on outer aspect back of left side of chest 8 cm below and back to Injury No 1

18 Injuries 1 2 4 and 5 are almost of similar dimensions Injury Nos 1 and 2 are 6 cm long each The incised wounds 4 and 5 are 5 cm x 4 5 cm respectively in length Thus these injuries appear to have been caused by same knife

19 If we examine injuries 3 4 and 6 together it would appear that these injuries could have been caused by single blow If in the process of inflicting injuries on the neck the chin and the outer border of the left ear and the site of Injury No 4 were in one line then the edge of knife grazing against the left angle of mouth and outer border of left ear would have caused the incised wound 3 cm and 6 1 cm x ½ cm and ½ cm x ½ cm respectively Thus the version given by Siraj Ahmad in the dying declaration is not against the medical evidence The medical evidence on the other hand corroborates the dying declaration

20 In view of what we have said above it is apparent that the dying declaration was of such a character on which implicit reliance could be placed. This dying declaration itself was sufficient to prove the offence of murder committed by appellant Saeed

21 The sufficiency or insufficiency of motive may not be material in this case It is very difficult to spell out the motive of a murderer Some times even on flimsy matters a person may commit murder Mohammad Ahmad (PW 6) has stated the motive part of the prosecution story His statement in this respect was not challenged by the prosecution in the cross-examination Not a single question was asked in this respect Hence it was established from the statement of Mahammad Ahmad (PW 6) that he had asked his son to leave the bad habit of sodomy and avoid the company of the appellant On his asking Siraj Ahmad had left the company of the appellant since one month before the occurrence This might have created some enmity with Siraj Ahmad and he could have gone to the extreme of commiting the murder of Siraj Ahmad

22. The learned Sessions Judge has placed reliance upon the recovery of blood stained knife and clothes from the cluster of Narkul He has believed Ghasita (PW 13) on the ground that that he had frankly admitted that sometime before the occurrence he had been beaten by the appellant for filling less cotton in his quilt In this way this witness was an inimical witness He resided at a distance of one mile from the place of recovery of blood stained knife The statement of such a witness could not be relied upon

23 Bharat Singh (PW 2) had stated about the recovery of blood stained knife He had stated that Ghasita (PW 13) and Ram Autar were present at Bilaspur Gate He had taken them along with him and gone to Panari Gate When the presence of Ghasita becomes doubtful then whole story regarding the recovery of knife also becomes doubtful In view of these circumstances the fact of recovery cannot be believed The lower court

had erred in placing reliance on such recovery

24 However, from the above discussion we come to the conclusion that the dying declaration is of such character on which implicit reliance can be placed There was a motive also for murder We, therefore, come to the conclusion that the lower court had rightly held the appellant guilty of the offence punishable under S 302, I P C

25 In the result the appeal fails and is dismissed The judgment and order of the court below are maintained The appellant be taken into custody to serve out the sentence He is on bail His bail bonds are cancelled

Appeal dismissed

1991 ALL L J 666

GIRIDHAR MALVIYA AND
B P SINGH, JJ

Ganga Prasad Dubey, Petitioner v State of U P and another, Respondents

Habeas Corpus Writ Petn No 11382 of 1989, D/- 16-12-1989

(A) National Security Act (65 of 1980), S 3 — Public order and law and order — Detenu forming a gang and looting persons who were to make deposit in banks — Using firearms and committing murder — Activity going to affect even tempo of life of community — People bound to feel insecured — Raises problem of public order

Constitution of India, Art 22(5)

(Para 4)

(B) National Security Act (65 of 1980), S 3 — Non-supply of relevant documents — Detenu himself admitting his complicity in alleged incident — Not demanding copies of documents before making representation — Nothing to indicate that satisfaction of detaining authority affected by absence of documents — Plea of supply of documents raised at belated stage — Cannot be permitted

Constitution of India, Art 22(5)

AIR 1979 SC 541, Rel on (Para 7)

Cases Referred	**Chronological Paras**
AIR 1979 SC 541 1979 Cri LJ 462 (Rel on)	7

R A Misra for Petitioner A G A and Sri Shirish Chandra for Respondents

GIRIDHAR MALVIYA, J — Petitioner Ganga Prasad Dubey was detained by an order dated 14-3-1989 passed u/S 3(2) of N S A by the District Magistrate, Allahabad According to ground of detention furnished to him, the petitioner along with his associates on 18th October, 1988 had stopped the Scooters of Prabhu Dayal Arora and Sharad Kumar Srivastava and had looted Rs 1 lacs from the Diggi of Prabhu Dayal Arora's scooter and Rs 2,50 000/- from the Diggi of Sharad Kumar Srivastava after firing upon Prabhu Dayal arora who later on died in the hospital One Babu Lal was also injured in the aforesaid firing The FIR without naming any person who registered at Colonel Ganj Police Station, Allahabad as crime No 885 of 1988 u, Ss 394; 302, IPC Later on the case was converted u/S 396, IPC During the investigation, the complicity of 7 persons was found in this incident including that of the petitioner who was arrested on 28th December 1988 On his arrested, the petitioner admitted that in the loot resulting in the murder of Prabhu Dayal Arora he had got a share of Rs 75,000/-, out of which he had deposited Rs 25 000/- in the State Bank of India, Manauri in his name Rs 8600/- in the Bank of Baroda, Nawada Branch, in the name of his son and that he had given Rs 10,000/- each to co-accused Gyan Roop Dwivedi and Pappu Singh He further admitted that he had deposited Rs 25,000/- in the Nawada Branch in his name and Rs 15,000/- in the State Bank of India, Sulem Sarai Branch in his name Rest of the money was admitted to have been spent by him in purchasing bicycle and clothes of his children etc The petitioner also disclosed that out of loot of 6 lacs

Rs 50000/- were spent for purchasing car for the Gang The petitioner was put for identification on 31st January, 1989 The witnesses identified him infront of the Magistrate After investigation had been completed, charge-sheet in the above mentioned case, had been submitted The incident had happened in a very thickly populated locality and the people were terrorised There was also sense of insecurity in the people The business community was badly dis-satisfied and Vyapar Mandal also decided to observe closer in the Muthiganj market on 19th October, 1988 Even the normal life of community had been disturbed and public order had also been disturbed, on account of the said incident It was further mentioned that the petitioner was detained in Naini Central Jail, Allahabad but there was apprehension that he would soon be released on bail On being satisfied that after his release from Jail the petitioner was likely to indulge in similar activities again which might have affected the maintenance of public order, the detention order was passed against him by the detaining authority

2 The present petition was filed challenging the detention of the petitioner in pursuance of the aforesaid order The petitioner had also filed supplementary affidavit On the notice being issued, counter-affidavits on behalf of the detaining authority, State Government and the Central Government were filed The petitioner also filed rejoinder-affidavit

3 We have heard Shri R A Misra, learned counsel for the petitioner as also Shri Prem Prakash learned Additional Government Advocate and Shri Shirish Chandra learned counsel appearing on behalf of the Central Government in this case

4 Shri R A Misra contended that the activities mentioned in the detention order do not relate to public order but were only the activities confined to problems of law and order It is not possible to accept this contention If a person by forming a gang was looting persons, who were going to make deposits in the Bank their activity was clearly one which was going to affect the even tempo of life of the community as the people would feel insecured that at any point of time they may become victims of such a gang The contention of the petitioner that the ground does not raise a problem of public order is not correct and is to be rejected

5 The learned counsel for the petitioner then contended that the real object of the detention order was to nullify the effect of bail, which the petitioner was likely to get According to the learned counsel, the satisfaction of the detaining authority alleged to be based on the grounds of detention was not real as the real ground for detaining the petitioner was that he was being released on bail This contention too is devoid of merit We have found that the past activity of the petitioner was likely to affect the maintenance of public order What the detention order means to say is that in future also it was only after the petitioner got released on bail that the necessity to prevent him to act in similar manner arose Consequently the awareness of the detaining authority shown in the order of detention to the effect that the petitioner was in jail and was likely to come out of it cannot mean that the order of detention was passed to nullify the effect of the bail order

6 The learned counsel for the petitioner relying on para Nos 24 25 and 26 of the petition next contended that a detention order had also been passed under N S A against a co-accused of the petitioner in crime No 885 of 1988 by the District Magistrate Allahabad on the basis of his involvement in the said crime No 885 of 88 It is alleged that as the order of detention against Shyam Behari was not approved by the Advisory Board the detention of the petitioner should also be held to be bad However, in para 10 of the counter-affidavit of Shri Harish Chandra Chaudhary it has been asserted that the detention order against Shyam Behari was not based on his activities relating to Crime No 885 of 1988 but on the basis of an incident of firing alleged to be made on the police party Learned counsel for the petitioner wants to assert that even in that case, the detention of the petitioner should be treated

to be had in the eyes of law, as according to him if the incident of the present case in crime No. 885 of 88 could give rise to the detention of the petitioner that ground was also available against co-accused Shyam Behari and Shyam Behari's detention order should also have been based on that ground. Shyam Behari's detention order has not been placed before this Court. Moreover, as stated in para 10 of the counter-affidavit mentioned above, the detention order against Shyam Behari was based on his involvement in a separate incident. If the detention order of Shyam Behari was not approved by the Advisory Board that can have no effect on the order of the detention against the petitioner. Apart from that, neither the date of detention of Shyam Behari has been disclosed nor is it asserted that the detention order of Shyam Behari was passed after complicity of the petitioner and his associates had come to light in crime No. 885 of 89 giving rise to the detention order of the petitioner. Consequently, the petitioner cannot get any benefit from the fact that the detention order under N.S.A. against Shyam Behari was not approved by the Advisory Board.

7. It was then contended by the learned counsel for the petitioner that the petitioner was not named in the first information report and since the statements of the witnesses who had identified the petitioner as also since the copy of the pass books of the Savings Bank Accounts which the petitioner had opened for depositing the booty coupled with the copy of the statement of co-accused were not furnished to him he was deprived of his right to make an effective representation. What is relevant in this regard is that the petitioner had himself admitted his complicity in this case and had given the number of the bank account etc. which had been mentioned in the detention order. The petitioner had never earlier asked for any further particulars from the detaining authority alleging that in the absence of such particulars, he would be deprived of his right to make an effective representation. It cannot be said that in the absence of these documents the satisfaction of the detaining authority about the involvement of the petitioner in the crime was not justified or that the alleged incident could not be made the basis of the detention order against the petitioner by the detaining authority. In view of the fact that the petitioner has never earlier demanded any such documents or material, he cannot be permitted to raise this plea at this belated stage in the present habeas corpus petition. In this respect it will be relevant to refer to the following observations of the Supreme Court in the case of Bhawar Lal v. State of Tamil Nadu, AIR 1979 SC 541 (on page 545) —

> If the detenu wanted any more particulars such as the name of the intelligence officer or other information, he could have well asked for the particulars before making his representation. That he never did. It was not as if any privilege had been claimed by the Government in respect of the intelligence reports. In fact, we find that the intelligence reports were produced before the learned Judges of the High Court at the hearing of the Writ Petition there. There was no complaint before us that the detenu or his counsel wanted to peruse the reports and were denied the opportunity of doing so. We do not think that the detenu could be said to have been denied a reasonable opportunity of making a representation merely because particulars which he never desired in respect of a ground which was not vague were not furnished to him. We are unable to see any force in any of the submissions advanced on behalf of the detenu.

Consequently, even this ground of the petitioner is not sustainable.

8. In the end, the learned counsel for the petitioner contended that the petitioner's continued detention was bad as there was considerable delay in the disposal of his representation, both by the State Government as also by the Central Government. In this connection, we find that the petitioner made a representation against his detention order on 31st March, 1989. This representation was received by the District Magistrate, Allahabad on April 1, 1989. Second was the holiday. The representation was sent to

Senior Superintendent of Police Allahabad for his comments on 3rd April, 1989 The Senior Superintendent of Police had to send the representation to the police station through the Circle Officer and later the concerned police station and the circle officer prepared their comments then the representation along with the report of police station was received back in the office of the District Magistrate on 7th April, 89 8th and 9th April, were again holidays On the 10th April, 1989, the representation was sent to Lucknow with a covering letter of the District Magistrate and was received by the State Government on 11th April, 89 The State Government forwarded one representation to the Union of India Thereafter the representation was examined in the concerned section which prepared a detailed note upon it The representation was put up before the Joint Secretary Home The Joint Secretary Home and Special Secretary Home examined the representation and forwarded it to the Government with their notes and the State of U P on 14th April, 1989 rejected the representation of the petitioner The representation sent to the Central Government was received by the Central Government on 12th April, 1989 On 13th April 89 itself the Central Government called some more information on the representation of the State Government This information was received back by the Central Government on 20th April 1989 Thereafter the representation was finally rejected by the Central Government on 25th April 89 A perusal of these dates itself would indicate that there was absolutely no delay on the part either of the State Government or Central Govt in the disposal of the representation made by the petitioner Consequently this ground also fails

9 As none of the points raised by the learned counsel for the petitioner are sustainable, there is no merit in this petition which is accordingly dismissed

Petition dismissed

1991 ALL L J 669

H C MITAL AND K NARAYAN JJ

State of U P, Appellant v Ram Ajorey and others Respondents

Govt Appeal No 3282 of 1978, D - 23-1-1991

Penal Code (45 of 1860), Ss 300, 34 — Murder — Absence of motive — Evidence of eye-witnesses that they had seen accused attacking deceased with Lathis and was apprehended on spot was highly suspicious — Prosecution witness had taken active interest in getting accused falsely implicated due to enmity —Acquittal of accused — Cannot be interfered with

Criminal P C (1974), S 378

(Paras 10, 11, 14)

A G A for Appellant R K Jain for Respondents

JUDGMENT — The State has preferred this appeal against the judgment dated 27-7-1978 acquitting all the above named respondents under Sections 302/34 I P C passed by Sri G S N Tripathi, the then Addl Sessions Judge, Basti

2 To appreciate the facts of the case the following pedigree as quoted in the judgment would be of help

(for table see next page)

P W 1 Smt Dhanraji alias Prema alleging herself to be the wife of Mewa Lal (deceased) lodged an oral F I R at P S Dumariaganj District Basti on 1-3-1978 at about 2 p m in the night along with village Chaukidar Dukkhi and others and accused-respondent Jai Ram had also been taken having been apprehended on the spot According to Smt Dhanraji Ram Ajerey had filed a case against her husband and for that he had been coming to him for the last 3-4 days prior to the incident to compromise that on 28-2-1978 at about sun-set Ram Ajerey armed with a Lathi came to his house and asked Mewa Lal to accompany him to the field saying that

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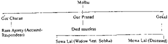
DI/FI/A495/91/RK/VNP



tomorrow there was date before Deputy Saheb When her husband along with Ram Ajorey reached besides the field of Mangroo Ahir, Jai Ram accompanied Ram Ajorey along with his son-in-law Jawahar Both of them were also armed with Lathis and when they reached the field Ram Ajorey said that he could bring Mewa Lal with difficulty After killing he would settle the dispute finally and then all the three of them attacked Mewa Lal with Lathis On hearing the cries Mangroo, Ghisa and Ibrahim also arrived there from the near by fields The three assailants escaped towards south, but Jai Ram was caught Her husband died on the way to the police Station on the bullock-cart On the basis of the F I R case was registered under Section 302, I P C Investigation of the case was entrusted to P W 7, S I Sita Ram Yadava who started the investigation from 3 05 a m and recorded the statements of the complainant Smt Dhanraji Dukkhi Chaukidar and Jai Ram accused and in the morning he prepared inquest report and sent the dead-body for postmortem and after investigation of the case submitted charge-sheet At the trial the three respodents were charged under Section 302 read with Section 34, I P C

3 To prove its case prosecution examined seven witnesses of whom P W 1 Smt Dhanraji alias Prema is the alleged widow of the deceased, P W 2 Mangroo and P W 5 Ghisa are the other two eye-witnesses and they corroborated the prosecution story P W 4 Head Constable Sadhu Tiwari proved the F I R written by him and the entries in the G D regarding registration of the case P W 3 had taken the dead-body for postmortem P W 6 Dr J N L Srivastava had done the autopsy on the dead-body of the decased on 1-3-1978 at 3 30 p m and proved postmortem report (Ex Ka-10) according to which he noted as follows

ANTE MORTEM INJURIES

1 Lacerated wound 5 cm x 0 4 x bone deep 2 cm below right lower eye-lid-Obliquely placed

2 Multiple contusion with parallel linear Marks in an area of 30 cm x 20 cm on the left side of chest and back The contusion over present in several direction

3 Multiple contusion in an area of 24 cm x 10 cm over the front oval anterior side of left uper arm extending top of the shoulder to elbow Contusions with parallel linear marks scattered in several direction

4 Multiple contusion in an area of 30 cm x 8 cm over the right upper arm Extending from shoulder to elbow joint

5 Multiple contusion in an area of 16 cm x 14 cm over front of right thigh contusions and scattered in various direction

4 On internal examination membrances of brain were congested There was fracture of left 2nd to 8th ribs Left lung had collapsed and right lung was lacerated Stomach was empty Small intestines contained pasty material and large intestines were empty In the opinion of Dr Srivastava the death was caused due to shock and haemorrhage as a result of ante-mortem chest and lung injuries

5 Lastly, P W 7 S I Sita Ram Yadava, I O deposed about the various steps taken by him in the course of the investigation

6 On the other hand, though the accused denied their participation in the occurrence and alleged false implication due to enmity

and Jai Ram alleged his arrest from his house by the police, in defence two witnesses namely Mohammad Shafi (D W 1) and Jhilkai Singh (D W 2) were examined D W 1 Mohammad Shafi deposed that Smt Dhanraji was not the wife of deceased Mewa Lal nor she was his kept and that the dead-body of Mewa Lal was found in the morning, that Smt Dhanraji was a leper and beggar, that Ghisa witness was also a laper D W 2 Jhilkai Singh stated that Smt Dhanraji was wife of Govinda Harijan and that she was living in Mauza Chikaunia and arrived in the village about 5-7 years back

7 The learned Sessions Judge, hence however, did not believe the prosecution evidence, hence acquited all the accused-respondents On being aggrieved, the state has preferred this appeal

8 The law is well settled that appeal from acquittal are allowed only in exceptional circumstances It is an extraordinary remedy The appeal by Government should be made judiciously and only in cases where the judgment is so clearly wrong that its maintenance would amount to a serious miscarriage of justice or when a principle is involved or the question is one of great importance or of great public importance The burden is on the Government to show that the acquittal is wrong and strong and urgent grounds must be made out to justify interference When there is reasonable doubt as to the guilt of the accused, the High Court will not interfere nor will it interfere merely because upon evidence the lower court might have come to the conclusion of guilt, unless it is quite clear that the acquittal is wrong. The High Court will not also interfere merely because it might itself, as an original court, have arrived at a different conclusion Where an appeal against acquittal turns on the facts it would only succeed if the judgment of acquittal is clearly wrong and involves a miscarriage of justice or when the trial judge has erred in failing to draw the clear, indubitable and irresistible inference from the facts or when the trial Court s appreciation of evidence is vitiated by failure to take note of a very important fact or where finding of fact is based on an erroneous rejection of evidence Thus the High Court will only interfere if it is proved without any doubt not that the accused is guilty, but that he has been acquitted on unreasonable grounds

9 On behalf of the State learned Government Advocate pointed out that there was a very imporant circumstance in favour of the prosecution that the respondent Jai Ram was apprehended on the spot and was taken to the police station and the report was also recorded at the dead of night and that the other five witnesses were working in the fields nearby hence were natural witnesses of the occurrence He also urged that there was no reason to disbelieve that Smt Dhanraji was living as a wife of the deceased and had allowed her husband to the scene of occurrence

10 The motive for the respondents to commit the murder is said to be a litigation in between the deceased and Ram Ajorey P W 1 Smt Dhanraji admitted in her cross-examination that Mewa Lal was son of Gokul She has further admitted that Gur Charan and Gur Prasad were two other brothers of Gokul and Sewa Lal was brother of Mewa Lal, who died that son of Sewa Lal is alive She further stated that suit for partition was filed by Ram Ajorey In view of the fact that there is a son of Sewa Lal brother of Mewa Lal Ram Ajorey, cousin of Mewa Lal could not have gained anything after murdering him. In any event he would have got the share to which he was entitled Hence prima facie in the absence of any evidence that deceased Mewa Lal was in occupation of larger share than to which he was entitled and did not want to part with it, there could be no motive for Ram Ajorey to kill him Smt Dhanraji has further admitted that witnesses Mangroo, Dukkhi Chaukidar and Angnu are real brothers and Mewa Lal had sold some of his plots to Mangroom Angnu and his brothers She herself denied that they had taken possession over larger share To the question whether Smt Shobha Rani, wife of Sewa Lal had filed a case against Mangroo and Angnu that they had taken possession over larger share and that Ram Ajorey has a witness for

Shobha Rani she expressed her ignorance She however, admitted that the plot in which Mewa Lal was killed was in possession of Mangroo and he had grown gram there in and that Mewa Lal had sold that plot to (sic)

11 Regarding the accurrence, according to the prosecution itself it had taken place after sun-set and its report was lodged in the night at 02 00 hrs i e after about eight hours The distance from the scene of occurrence is six miles Dukkhi chaukidar, who is highly interested person as he had purchased plots from Mewa Lal along with his brothers and against whom application had been moved Shobha Rani and Ram Ajorey, was a witness for Shobha Rani, had also arrived and had taken Smt Dhanraji to the police station to lodge the report Even if all these facts are admitted that Smt Dhanraji was living as a wife or kept of the deceased and that the occurrence had taken place in the evening after sun-set, from the facts and circumstances of the case the evidence of the prosecution eye-witnesses that they had seen the respondents attacking the deceased with Lathis and the respondent Jai Ram was apprehended on the spot, is highly suspicious

12 It does not appear at all worthy of credence that Ram Ajorey would have gone to fetch Mewa Lal at that time and Mewa Lal would have accompanied him as stated by Smt Dhanraji (P W 1), that he was feeling very hungry because he had returned from the market at that time and had taken the meal in the morning at about 10 a m and she had started cooking meal for him There was no urgency and moreover, this part of her testimony prima facie is an improvement over and above her version under Section 161, Cr P C as well as in the F I R Subsequently on finding in the postmortem report that the stomach was empty and there was only some pasty material in the small intestines This story has been cooked up Even if the same is believed and it is further believed that after a few minutes of the departure of Mewa Lal along with Ram Ajorey Smt Dhanraji had followed them feeling suspicious On Natural instinct it is further doubtful that from the place where she is alleged to have heard the cries and there after on reaching the scene of occurrence could see the assailants attacking her husband She had admitted that she was at the tube-well of Ram Ajorey when she heard the cries She had admitted in her cross-examination that the tube-well was at a distance of about 200 paces from the place where her husband was attacked It is indeed doubtful that she could reach the scene of occurrence before the assailants had escaped The other two witnesses, namely P W 2 Mangroo as well as P W 5 Ghisa were also at a sufficient long distance from the scene of occurrence In the site-plan (Ex Ka-9) prepared by the Investigating Officer the place C is shown where Mangroo was and the distance has been shown as 35 paces while Ghisa was at place 'B' and it was 100 paces away from the scene of occurrence Another witness Ibrahim was at place E' at a distance of 115 paces Smt Dhanraji has further stated that she had not run from the tube-well, but had moved normally and that by the time she reached the place of occurrence the assilants had already escaped 50-60 paces towards south after attacking Mewa Lal She has further stated that all the witnesses had reached almost simultaneously Mangroo (P W 2) has also however, stated that he was in his field in which the murder has taken place He was gathering (Lal s that Jai Ram and his 'Sala' Jawahar (brother-in-law) were sitting there, Ram Ajorey arrived with Mewa Lal and Ram Ajorey said that he had brought Mwa Lal with great difficulty and exhorted Jawahar and Jai Ram to kill Mewa Lal, all the three attacked him with Lathis that Smt Dhanraji was at the tube-well at that time and came running shouting from there, while Ghisa and Ibrahim had arrived there, that he and others chased the accused and succeeded in apprehending Jai Ram P W 5 Ghisa has stated that he was also in his field and on hearing the alarm Mangroo and Ibrahim also reached there and they saw that the respondents were attacking Mewa Lal and Smt Dhanraji also arrived there running and weeping, that they had chased the accused and succeeded in apprehending Jai Ram He has admitted that his field was at a distance of

100 paces as shown in the site-plan It is indeed very doubtful that he from the distance of 100 paces and Ibrahim at a distance of 11 paces could arrive and succeed in apprehending Jai Ram after covering more than 100 paces

13 P W 1 Smt Dhanraji alias Prema has further deposed that while she was taking her husband to the police station along with Dukkhi Chaukidar and others in the way Ram Ajorey and Jawahar stopped them and attempted to assault them and that she had so stated at the time of lodging the report and also to the Investigating Officer, but could not explain why the name was not written there It was such an important circumstance that if there had been any truth in it the same would have been mentioned in the F I R but she has subsequently admitted that Ram Ajorey was apprehended near the police station If Ram Ajorey had been responsible for the murder of the deceased he would not have gone to the police station According to Ram Ajorey he was going to the police station himself to lodge the report, when he was apprehended

14 She has further stated that accused-respondent Jawahar was son-in-law of Ram Ajorey, but she subsequently admitted that Ram Ajorey had two daughters, one was about 30 years old and the other 12 years old and both were unmarried Thus, her statement that Jawahar is son-in-law of Ram Ajorey is patently false and this relationship has been assigned to implicate him along with Ram Ajorey P W 1 Smt Dhanraji further admitted that she had recieved the copy of the F I R after the dead-body was sent in the morning, that further supports the defence version that the report was not lodged in the night as alleged nor Jai Ram was taken to the police station, but he was subsequently arrested from the house of Ram Ajorey in the morning From the record it is further clear that Dukkhi Chaukidar had a grouse against Ram Ajorey and others and therefore, he had taken active interest in the case in getting these accused-respondents implicated and made his own brother Mangroo (P W 2) as an eye-witness of the occurrence In view of the above circumstance prima facie, the decision of the trial court acquitting the opposite parties cannot in any manner be said to be wrong least to say that it amounts to serious miscarriage of justice and therefore, does not call for any interference

15 The appeal is, therefore, dismissed The acquittal of the opposite parties is upheld

Appeal dismissed

1991 ALL L J 673
= 1991 Cri. L J 1597

R K. SAKSENA, J

Sonpal and another, Appellants v State of U P , Opposite Party

Criminal Appeal No 748 of 1979, D/- 24-8-1990 *

Penal Code (1860), Ss 307, 323, 324, 34 — Charge under — Persons from both sides suffered injuries — Case of bilateral fight — Failure on part of prosecution to explain how the event sparked off and how accused suffered injuries — Accused entitled to be acquitted.

(Paras 2, 4, 5)

P M. Gupta and J N Chaturvedi, for Appellants, G A Raj Singh, for Opposite Party

JUDGMENT — Four persons, namely Ram Swarup, Mallan, Son Pal and Raj Pal were tried for committing the offence of attempted murder and 'voluntarily causing hurt' respectively punishable under Ss. 307, 323 and 324 of the Indian Penal Code, each read with Section 34 thereof The trial ended in acquittal of Ram Swarup and Mallan of all the charges. Son Pal (appellant) was, however, convicted under Section 307 of the Indian Penal Code with the sentence of rigorous imprisonment for a period of 4 years and Raj Pal (appellant) was found guilty of committing offence punishable under Section 323 of the Indian Penal Code and has been awarded sentence of rigorous imprisonment for a period of 6 months They were also acquitted on other charges per judgment and order dated the 21st of February 1979 passed by Shri H P Pathak the then IV Additional Sessions Judge Aligarh in Sessions Trial No 287 of 1977

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*Against the judgment and order passed by Sri H. P Pathak, IVth Addl. Sessions Judge, Aligarh, D/- 21-2-79

2 After having heard the learned counsel for the parties I am of the view that the decision under appeal suffers from serious infirmities and, therefore, it cannot stand. I do not think it necessary to refer to the prosecution and defence version Suffice it to mention that it was a case of bilateral fight in which three persons of the prosecution side and two persons namely Son Pal (appellant) and Ram Swarup (who has been acquitted) of the other side suffered injuries Son Pal had an incised wound on the left lumber region near umbilicus and Ram Swarup had an incised wound on his cheek Obviously the main question was as to how the event sparked off and who was the aggressor There is no clear and categorical finding of the court below on this vital issue After having referred to the injuries suffered by Son Pal (appellant), the learned trial court remarked that it has not been satisfactorily explained at all by the prosecution It accordingly observed

No doubt there seems to be this improbability in the prosecution case and the evidence of the above witnesses "

3 The court below then proceeded in the same continuation to point out the infirmities which appear in the defence version and remarked thus the defence version also suffers from inherent improbability' It further observed in the same continuation —

Meaning thereby that both in the prosecution and defence versions something has been suppressed to make the story of such a nature which may afford ground for taking plea of self defence

4 Further from the judgment under appeal it appears that the trial Judge entertained a feeling that there were two incidents, one took place at 6 a m and the other at 6 30 p m This was entirely a new case propounded by the court below which has omitted to consider the matter from a correct angle of vision There is statutory principle of criminal jurisprudence that in a case like this the prosecution has to first establish in regard to the manner in which the incident took place Yet another cardinal principle is that if it is found from the material on record that the accused had suffered injuries in the incident it is the bounden duty of the prosecution to explain those injuries The relevant remarks and observations of the court below have been reproduced above and it is evident therefrom that the prosecution has miserably failed to show how the event sparked off and even the court below rightly realised that the prosecution has not laid true facts leading to the incident In a situation like this the inevitable conclusion should have been recorded, namely the acquittal of all the accused of the case The trial court has erred in introducing a new story and in recording a conclusion that there was a free fight Son Pal (appellant) clearly stated that he fired shot in self-defence If he and his close relations had suffered injuries, he was perfectly justified in firing shots It was the user of the fire arm which brought the fall of the instance and the incident ended. The learned trial court has thus erred in sentencing the appellants for the offence stated above

5 In the result the appeal is allowed The judgment and order under appeal convicting and sentencing the appellants are set aside Both the appellants are found not guilty and are acquitted on the charge Their sureties are discharged

Appeal allowed

1991 ALL. L. J 675
= 1991 Cri. L. J 1655

RAVI S. DHAVAN, J

Rajneesh Saxena Petitioner v. Suresh Chandra Respondent.

Civil Misc. Contempt Petn. No. 49 of 1989 D/- 5.2.1991

Contempt of Courts Act (1971), Ss. 2(b) and 12 -- Civil contempt -- Contempt petition against Honorary Secretary of College Management Committee -- Contemner flouting orders of High Court directing payment of salary to petitioner teacher -- His services also terminated -- Apology tendered by contemner only farcical -- Held, that contrition was not bona fide and he could be sentenced to imprisonment

The petitioner was appointed as a teacher by the College on ad hoc basis but his salary was not paid. In a writ petition filed by him against the Honorary Secretary of Committee of Management of the College, directions were issued by the Division Bench for payment of his salary. In spite of assurances the salary was not paid. His services were also terminated. He filed apology but it was not genuine.

Held, that there could be no occasion for the court to respond in a contempt proceedings on emotion, but judicial discretion. Thus, before the court comes to the conclusion on how law and justice must treat a contemner the settled law is to be seen.

(Para 4)

In the instant case, there was never any intention, by the contemner to give obedience to the High Court's orders. The assurances, apology and undertaking in the affidavit and further assurances were never intended to be kept. The contemner, far from complying with the stay order, terminated the petitioner's services. Another Division Bench passed another stay order on yet another writ petition. The contemner had at every given occasion never intended to comply with the stay order. His apology was a farce and not honest, his assurances to the court were deceitful and had no bona fide perspective. But, for these contempt proceedings, he neither cares for orders of the court nor renders respect to them. He spurned his apology and thwarted his assurances. This is not contrition, but the opposite of it. Seeking mercy on having failed to meet the charges on contempt, and after a contumacious conduct to disgrace orders of the High Court, does not permit High Court to consider compassion. The settled law does not sanction it.

Case law discussed.

(Paras 9, 10, 11)

In the circumstances of the case having regard to the overall circumstances that the act of contrition was not bona fide but a ruse to escape punishment, a fine alone will not meet the ends of justice and that a sentence of imprisonment is necessary. Court instead of sentencing him to simple imprisonment, ordered that he be detained in a civil prison and should pay fine.

(Para 13)

Cases Referred	**Chronological**	**Paras**
AIR 1988 SC 1025		8
1986 Cri LJ 869	AIR 1986 SC 1074	7
1972 Cri LJ 754	AIR 1972 SC 1197	6
1969 Cri LJ 401	AIR 1969 SC 189	5

P. S. Baghel, for Petitioner; V. S. Saxena and S. N. Misra, for Respondent.

ORDER -- The charges of having committed contempt has been accepted by Suresh Chandra, the contemner, other Honorary Secretary, Committee of Management, S. M. College, Chandausi, District Moradabad. In reply to the arguments of learned counsel for the petitioner, it was submitted on behalf of the contemner by Mr. V. S. Saxena, Advocate, that to argue the matter would only make the position worse, and that it would be better prudence that the contemner Suresh Chandra leaves himself to the mercy of the Court.

CI-DI-A197/91/MVJ

2 The contempt petition was heard at length, and orders were reserved after parties had an opportunity to apprise themselves with the record of the court, afresh, and the law as applicable, in reference to the contempt This judgment will be incomplete without the facts as already noticed by this Court in it's order dated 15th November, 1990 as a consequence of which the charges had been framed Rather than notice the facts all over again, it would be better to refer to the order of 15th November, 1990, which runs as under

"This contempt petition arises out of a pending writ petition No 16115 of 1988 Rajneesh Saxena v Committee of Management S M College, Chandausi The contempt petition is directed against the acts of one Suresh Chandra, Honorary Secretary, Committee of Management, S M College, Chandausi, District Moradabad The allegations against Suresh Chandra rest on the order of the Bench in the aforesaid writ petition which gave directions that the petitioner Rajneesh Saxena, an ad hoc teacher at the institution shall be paid his salary The conditions are set in the order The order is reproduced below

"Issue notice

We have heard Shri P S Baghel holding brief of Shri V B Singh, learned counsel for the petitioner and Shri R G Padia, who appeared on behalf of the respondent No 1 at considerable length

We are satisfied that it is a fit case for grant of interim order We, therefore, in modification of our order dated 29-9 1988 direct that the petitioner shall continue to work as ad hoc teacher in the respondent institution and shall be paid his salary as and when it falls due in accordance with law till a regularly selected candidate by the Commission becomes available for appointment or the services of the petitioner are terminated in accordance with law whatever is earlier"

When the petitioner presented this order to the Honorary Secretary, it is alleged that he declined to follow the order The petitioner further alleges that the opposite party Suresh Chandra in his capacity as Honorary Secretary of the College would neither permit him to join his duties nor receive the arrears of pay The opposite party aforesaid filed a counter affidavit as a defence In his defence he justified and accepted the position that there was an order of the Division Bench and that its compliance was not made Thus, the opposite party gave his reasons on his defence The petitioner replied by a rejoinder affidavit giving his submissions that the defence taken to explain away the situation on legal technicalities was wrong What remained between the defence of the opposite party and the allegations of the petitioner was a situation that there was an ad hoc appointment on the basis of which an order of the High Court dated December 19, 1989 had to be complied with

One aspect is very significant. After the pleadings were exchanged, last of them being the rejoinder of the petitioner, served on counsel for the opposite party on May 8, 1989, and filed on record of the court on July 19, 1989, the opposite party took up another defence This aspect is noticed in the application of the opposite party on August 8, 1989 supported by an affidavit, affirmed on August 7, 1989 In this affidavit, the opposite party took a summersault by accepting that he would now continue to permit the petitioner to work as he is ready and willing to abide by the interim order dated December 9, 1988 passed by a Bench of this High Court. The opposite party thereafter submits in his affidavit that the court consider his unqualified apology and take a lenient view of the matter and pardon the opposite party Then came an affidavit served on the petitioner on April 24, 1990 placing on record that arrears of pay admissible to the petitioner consequent upon the order of the Division Bench is an amount of Rs 38,373/- In this affidavit he submits that it is beyond his power to pass bills as the salary bills have to be passed by the District Inspector of Schools. The record must be set right in reference to the present contempt petition That the issue in this case is not as to who has to pass the bills but who occasions denial of the salary and recognition of the petitioner as an ad hoc teacher

In para 7 of the supplementary affidavit served on the opposite party on 11th April, 1990 there is an averment to the effect that the opposite party threatened the petitioner that should he desire recall of the termination order then he must withdraw his contempt petition A reply to this paragraph is given in the counter to the supplementary affidavit received by the petitioner on April 24, 1990 and sworn on the same date In the allegations made by the petitioner on April 24 1990 and sworn on the same date On the allegations made by the petitioner this opposite party terms the petitioner s submissions clock and bull story narrated by the petitioner" Thus aspect is not relevant but becomes one by subsequent events on record The contemner offered his apology unconditionally in August. 1989 by an affidavit The matter came up before this court on January 2 1990 After it was heard it was demonstrated to the court that the stay order of the Division Bench dated December 9 1989 had yet to be complied with Clearly the record stood as compromising the order of the Division Bench after the apology had been tendered and the issues thus became one of questioning and considering on what was the apology worth if consequential steps had not been taken by the opposite party The apology of the opposite party was, thus, now in doubt and its bona fides were suspect Beyond this action of the opposite party the issue on which this contempt action is based, the issue did not cease On January 2. 1990 a submission had been made on behalf of the opposite party by a Senior Advocate appearing for him, that he will ensure that the salary as is payable on an ad hoc teacher strictly according to the direction in the order of December 7 1988 is delivered to the petitioner on this assurance the court gave no directions This court set on record of the order sheet the following observations

"In these circumstances this court considers it appropriate in the interest of justice that the said respondent must have an opportunity to comply with the court's order Learned counsel for the respondent seeks one month's time to comply with the order of 9 12-1989

When the apology was given by an affidavit in August, 1989 the opposite party was simultaneously giving an undertaking that the order of the Division Bench will be complied with Upon the forgiveness sought a further indulgence was pleaded. This court acted on the faith which the opposite party gave in an affidavit The undertaking given in the affidavit of August 1989 was not acted upon The opposite party was on test again A further indulgence and opportunity was pleaded on January 2, 1990

Now the court was testing the opposite party whether he had the intention to comply with the order of the Division Bench.

His intention is now available in another record being writ petition No 8241 of 1990 The record in so far as the opposite party is concerned rests thus (a) he gave an affidavit of apology in August seeking forgiveness for past action with an assurance that he would comply with the order of the Bench of December 9, 1988 (b) the assurance was not kept (c) he sought further time to act on his assurance on January 2, 1990, (d) further time sought was one month, and (e) the assurance given on 2 1 1990 was also not kept within the time taken by opposite party

The opposite party had other designs

Disregarding the apology given to the court on an affidavit with an undertaking and further indulgence sought on January 2, 1990, he passed an order of termination against the petitioner on February 27, 1990 This left the petitioner with no recourse except to come rushing to the court by another writ petition Another Division Bench of this High Court on April 11, 1990 stayed the termination order and gave directions to pay the salary to the petitioner The order of the Division Bench referred to above is reproduced below —

Issue notice

Sri N S Chaudhary has accepted notice on behalf of the respondents Nos 1 and 2 Sri N S Chaudhary prays for and is granted one week s time to file a counter affidavit Sri L P Naitham learned counsel for the University may also file a counter affidavit within three weeks The petitioner will have one week thereafter to file a rejoinder affidavit

Until further orders the operation of the order dated 27th February 1990 shall remain stayed

The respondents Nos. 1 and 2 are directed to pay the salary to the petitioner in accordance with law and continue to pay the same till further orders of this court

Sd/ S D A J
Sd/ G K M J
11 4 1990

Thus the record now makes one thing absolutely clear and beyond reasonable doubt that the affidavit of apology of the petitioner and the forgiveness which he was seeking by pleading to the court that a lenient view be taken was worthless and he had no intention of acting on his apology nor on the undertaking given to the court A further opportunity to purge his contemptuous action was violated with impugnity when further time taken on January 2 1990 to act on the order of the Division Bench the indulgence granted was abused This brought around the court to view the situation that the apology given was only for the purposes of purchasing time and harassing the petitioner and the contemner at every given time knew that the further indulgence which he was seeking on 2 1 1990 would not be honoured and, given an occasion he would thwart it

The contemner by his legal trickery is rendering the record as such that he is totally conscious of what the stay order is about. and what an apology and undertaking means and has utter disregard to the solemnly (sic) of an affidavit, the sanctity of an undertaking and respect to the orders of the court

This leaves the court with no option, judging the contemnor by the records which he has presented to be satisfied that the contemnor is such a person who must be punished in accordance with law as he is a habitual violator of the rule of law and has disrespect for the court and is a person whose faith is not to be acted upon, and the undertaking he offers are to hoodwink the court Should this situation continue, persons like the contemnor will treat orders of this court lightly and the contemnor will encourage precipitation of apologies and undertakings. which those who will offer it may not have the intention to act upon it

Regard being had to all these circumstances the contemnor must now be available at the Bar of the Court so that he get an opportunity to address the court on the charges which this court is to consider on the acts which he has occasioned

The opposite party is totally conscious of the charges on which he has to address the court which have already been indicated in this order which for the sake of repetition. the court will make the opposite party conscious again The opposite party is charged with violating the order of the Division Bench dated December 7, 1988 the undertaking and apology in his affidavit filed on August 8 1989 and the further indulgence sought and the undertaking given on January 2 1990

"Let the contemnor have an opportunity to address this court when he appears before the Bar of this Court on November 27, 1990, a date suggested by Mr N S Saxena, appearing on his behalf to answer the charges against him and show cause why he ought not to be punished in accordance with law

List on November 27 1990"

3 The facts as they are, what the court has to consider is how justice must treat the contemnor, in law On behalf of the contemnor the only argument which has been made is that he leaves the entire matter at the mercy of the court The argument, in effect, accepts the charges and the facts of having shown contempt to the orders of the doubt The contemnor, thus, pleads guilty and seeks

mercy In ordinary parlance this is known as contrition In the jurisprudence which governs the law of contempt there are parameters within which an act of contrition is to be judged

4 Logically or logistically the contemnor has become wiser by events The act of contrition is a phenomenon recognised in contempt proceedings But settled law cautions the court on the stage when realisation must come to the contemnor so that he can bona fide and with genuineness persuade the court that his repentance is true and has been realised by the contemnor prejudgment What after all is contrition The word itself is derived from the word contrite Which means penitent, thoroughly sorry especially for sin The New Lexicon Webster s Dictionary of the English Language 1987 Edition Contrition means remorse The aspect of realisation that contempt has been a matter of fact accomplished is an aspect which has been considered by the courts and a clear guideline is available Thus there is no occasion for the court to respond in a contempt proceedings on emotion but judicial discretion Thus, before the court comes to the conclusion on how law and justice must treat a contemnor the settled law is to be seen

5 The Supreme Court was considering an aspect of the appropriate juncture when an apology must be offered by a contemnor, if he desires that the court must accept it In the matter of Debabrate v State of West Bengal, AIR 1969 SC 189 (1969 Cri LJ 401), the Supreme Court observed (para 7)

> 7 The second point which the court unfortunately placed at the very forefront was failure to offer an apology and noted with great show of emotion that none was offered Of course an apology must be offered and that too clearly and at the earliest opportunity A person who offers a belated apology runs the risk that it may not be accepted for such an apology hardly shows the contrition which is the essence of the purging of a contempt However a man may have the courage of his convictions and may stake his all on proving that he is not in contempt and may take the risk. In the present case the appellants ran the gauntlet of such risk and may be said to have fairly succeeded."

6. In the case of Mulkh Raj v State of Punjab AIR 1972 SC 1197 (1972 Cri LJ 754) the Supreme Court was considering the aspect of apology and the nexus it has with contrition The case was one of libellous attack against Judges On the issue of apology the Supreme Court observed (para 9)

> "9 Apology is an act of contrition Unless apology is offered at the earliest opportunity and in good grace apology is shorn of penitence If apology is offered at time when the contemnor finds that the court is going to impose punishment it ceases to be an apology and it becomes an act of cringing coward The High Court was right in not taking any notice of the appellant s expression of apology without any further word The High Court currently said the acceptance of apology in the case would amount to allow the offender to go away with impunity after having committed gross contempt."

7 In the matter of Principal, Rajni Parekh Arts K B Commerce and B C J Science College v Mahendra Ambalal Shah AIR 1986 SC 1074 (1986 Cri LJ 869), the Supreme Court was considering a circumstance of flagrant violation of an order of the University and of the High Court and tendering of an apology by a contemnor at a late stage This case is closer to the aspect being considered by this court The Supreme Court observed as under (para 7)

> 7 The apology tendered by the said Chaturvedi and the said Pathak on behalf of himself and the trustees of the said Mandal comes at too late a stage The said Mandal the said Chaturvedi and the said Shastri as also the said Pathak who, it is stated is also, a trustee and a member of the Board of Trustees have acted most contumaciously They have flouted the directions given by the Syndicate of the Gujarat University they have flouted the order of the Vice-Chancellor of the University, they have flouted the order

of the Gujarat Affiliated Colleges Service Tribunal, they have flouted the orders of the Gujarat High Court they obtained from the court a conditional order of stay of the order of the Gujarat High Court appealed against by making a statement that the amount directed to be paid to Shah will be deposited in the High Court within two months when they had no intention whatever of doing so and they have trifled with this court by filing the said Criminal Miscellaneous Petition No 2885 of 1985 to confine this court's order passed on April 16, 1985 to the second appellant when they knew full well that the second appellant, the said Shastri, had died eleven days prior to the filing of the said Criminal Miscellaneous Petition. Their desire to make amends by passing the said Resolution dated March 7, 1986, when merely the result of the notice issued by this court on March 5, 1986, on which occasion, on his own showing the said Pathak was present and obviously communicated the other trustees that this court had issued notice to them on the present petition if any Court were to accept an apology of a contemnor in such circumstances. It would encourage litigants to flout the orders of the courts with impunity. We accordingly refuse to accept the apology tendered by the said Chaturvedi as also by the said Pathak on behalf of himself and the other trustees."

8 In the matter of Bigyan Kumar v Union of India, AIR 1988 SC 1025, the Supreme Court was reflecting upon the generality of a growing tendency to ignore the direction of the courts and multiplying instances of confrontation with court, the Supreme Court in no uncertain terms made it clear that if the judicial system is to work efficiently within the frame work of the rules of law litigants, the government not excluded, must accept the system render due obedience to orders made failing which justice must punish those who disobey. The observations of the Supreme Court are as under (at p 1027 of AIR) —

> "7 We would part with the matter by recording our serious concern and disapproval of the growing conduct of parties and public officers in particular of ignoring the directions of the courts and multiplying instances of confrontation. The Court, including the apex one is a part of the State and is a built in mechanism of the Constitution to administer justice in accordance with law. For discharging that duty the court has got to adopt an attitude of critical assessment of situation connected with litigation brought before it for adjudication. The manner of functioning of the court in accord with Rule of Law has to be dispassionate, objective and analytical. The Judges who preside over these courts do not act with a sense of superiority, nor do they look down upon others in the community. In order that the system may efficiently work and the purpose for which the courts are established is duly served it is necessary that everyone within the frame work of the Rule of Law must accept the system, render the obedience to orders made and in the event of failure of compliance, the rod of justice must descend down to punish. We hope and trust that everyone within the system realises this situation and does not unnecessarily get into a confrontation."

9 The law must now be applied to the actions of Suresh Chandra the contemnor. The order of the Division Bench which was awaiting compliance at his hands, is dated 9th December 1988. His affidavit of 7th August, 1989, filed after he had taken his defence in the counter affidavit justifying his actions, accepted that the violation continued. The affidavit offered an unconditional apology and an assurance to implement the order. This was eight months after the order. Six more months passed the compliance to the High Court orders had yet to be made, as noticed in the order of these proceedings on 2nd January 1990. Another four months were to pass, only to reveal to the court that the stay order of 9th December, 1988 had yet to bear its results. This becomes clear from the affidavit the contemnor served on the petitioner on 24th April, 1990.

10 There was never any intention, by the contemnor to give obedience to the High Court's orders. The assurances, apology and undertaking in the affidavit of 7th August,

1989, further assurances placed on record on 2nd January, 1990, were never intended to be kept Suresh Chandra, the contemnor, far from complying with the stay order, terminated the petitioner's services on 27th February, 1990 Another Division Bench passed yet another stay order on yet another writ petition

11 The contemnor, Suresh Chandra, had at every given occasion never intended to comply with the stay order His apology was a farce and not honest, his assurances to the court were deceitful and had no bona fide perspective But, for these contempt proceedings Suresh Chandra, aforesaid, neither cares for orders of the court nor renders respect to them He spurned his apology and thwarted his assurances This is not contrition, but the opposite of it Seeking mercy on having failed to meet the charges on contempt, and after a contumacious conduct to disgrace orders of the court, does not permit this court to consider compassion The settled law does not sanction it It was a wise counsel holding the contemnor's brief caution him not to fish with courts orders any further, else this court would have come with more severity by passing the maximum sentence for imprisonment.

12 Suresh Chandra aforesaid, has committed contempt with impugnity by repeatedly violating the orders of the High Court dated 9th December 1988 in Writ Petition No 16115 of 1988 Rajneesh Saxena v Committee of Management, S M College, Chandausi, leaving this court with no option but to sentence him with fine and imprisonment both, under S 12(1) of the Contempt of Courts Act, 1971

13 The court having found the aforesaid Suresh Chandra guilty of civil contempt upon his contumacious conduct and having no respect for the orders of the Court, in accordance with Section 12(3) of the Act considers it appropriate, having regard to the overall circumstances that the act of contrition was not bona fide but a ruse to escape punishment, that a fine alone will not meet the ends of justice and that a sentence of imprisonment is necessary This Court is not sentencing him to simple imprisonment, but does order that he be detained in a civil prison for a period not exceeding one month, and in addition pay a fine of rupees two thousand, failing which he be detained for a further period of one month in a civil prison This fine is to be deposited with the Registrar High Court within fifteen days

14 A warrant of commitment for contempt shall be processed by the Registrar High Court forthwith addressed to the Superintendent or Keeper of the Jail concerned. The contemnor Suresh Chandra aforesaid shall surrender himself to the Registrar, High Court, immediately

15 The costs of these proceedings shall stand at rupees five hundred

16 The contempt petition succeeds with costs as above

Petition allowed

1991 ALL. L. J 681
= 1991 Cri L. J 1662

G P MATHUR, J

Chinta Mani Tripathi Applicant v State of U P , Respondent.

Criminal Misc Bail Application No 12786 of 1990 D/- 14 12 1990

(A) **Criminal P C (1974), Ss 437 and 439 — Rules of Court (1952), Chap 18, R 18(1) — Application for bail — Applicant must have surrendered on date of admission for consideration of application — His surrender on date of notice of application to Govt Advocate is not necessary**

In sub-rule (1) of R 18 of Chap XVIII the words used are not that the application for bail shall be filed or received but the words are shall be entertained Therefore the proper interpretation of sub-rule (1) would be that no application for bail shall be admitted for consideration" unless the accused had surrendered This will be at the time when the bail application is taken up for consideration by the court for the first time It is not correct to say that a bail application is entertained on the date when the notice of the same is given to the Government Advocate

(Para 7)

The contingency that an accused may give notice to the Government Advocate before surrendering can arise only in a case where his bail has been cancelled by the Sessions Judge In a case where the accused applies for bail in the High Court after his bail application has been rejected by the Sessions Judge, he would be in custody as he would have moved the bail application before the Sessions Judge only after he had surrendered or had been taken into custody Sub-rule (2) of R 18 provides that in every application for bail in a case which is under investigation or which is pending in a lower court it shall be stated whether any application for bail had or had not been previously made before the magistrate or the Sessions Judge concerned and the result of such application if any Similarly sub-rule (1) requires that a copy of the order passed by the Sessions Judge on the bail application shall be filed along with the bail application moved in the High Court It is therefore, obvious that the accused would be in custody at the time when he gives notice of the bail application to the Government Advocate when he applies for bail in the High Court after rejection of his bail application by the Sessions Judge

(Para 8)

(B) Criminal P C (1974), Ss 437 and 439 — Rules of Court (1952), Chap 18, R 18, 3(a) — Application for bail — Giving of notice and hearing — Ten days should elapse — Court may hear earlier in exceptional cases

Rule 18(3) starts with the words "Save in exceptional circumstances It is therefore obvious that in exceptional circumstances' the bail application could be heard even through the period of ten days has not elapsed between the giving of the notice of the bail application to the Government Advocate and its hearing by the court The court may in an appropriate case hear the bail application even before the expiry of the prescribed period of ten days

(Para 10)

(C) Criminal P C (1974), Ss 437 and 439 — Allahabad Rules of Court, 1952 Chap 18, R 18(4), Cl (b) — Application for bail — Date of arrest of applicant has to be mentioned in application — Requirement is mandatory — However, court may entertain application in exceptional cases

Sub-rule (4) starts with the words ' Every application for bail shall show It shall also state the following particulars, namely The date of the applicant's arrest Therefore the words 'shall' has been used twice in sub-rule (4) The use of the word shall" raises a presumption that a particular provision is imperative It is, therefore, mandatory that the bail application must mention in the date of the arrest of the applicant In case the bail application does not disclose that the applicant is in custody the same may be rejected on this ground

AIR 1961 SC 751 and AIR 1957 SC 912. Foll

(Para 10)

However, though the provisions of Cl (b) of sub-rule (4) are mandatory and in case of non compliance thereof the bail application will be liable for rejection but in an exceptional case the court may entertain a bail application where the date of arrest of the applicant has not been mentioned In that case there must be material on record to show that at the time when the application is taken into consideration the accused was in custody

(Para 11)

(D) Criminal P C (1974), Ss 437 and 439 — Allahabad Rules of Court 1952 Chap 18, Rule 18 — Grant of bail — FIR lodged against accused applicant alleging offence under Section 376, Penal Code after 15 days of commission of offence — Medical examination conducted after more than 40

days — Case not committed to court of session even after more than three and half years — Held, that the applicant was entitled to bail
(Paras 14, 15)

Cases Referred	Chronological	Paras
1984 Cri LJ 160	AIR 1984 SC 372	12
1978 Cri LJ 952	AIR 1978 SC 961	12
AIR 1968 SC 488	(1968) 1 SCR 505	7
AIR 1962 All 543	1962 All LJ 729	6
AIR 1962 All 547	1962 All LJ 574	6
AIR 1961 SC 751		10
AIR 1957 SC 912		10

K C Divedi, Viresh Misra, Advocates for Applicant A G A for Respondent

ORDER — One Shiva Devi, daughter of Ram Charan gave a written application to the S S P , Allahabad, alleging that at about 6 p m. on 20-5-1987 the applicant Chinta Mani Tripathi placed a gun on her chest and threatened to shoot her and thereafter forcibly committed rape on her Some other girls who were accompanying the informant ran away from the spot after the applicant had threatened to shoot the informant These girls informed the mother of the informant at her house who proposed for the spot On the way applicant Chintamani Tripathi met her and also assaulted her It was further alleged that after the informent returned to her house the applicant Chintamani used to sit at her door with a gun and did not permit her not any member of her family to go out and that at every time someone from the side of the applicant blocked the way On 4-6-1987 the informant s father sent an information to the District Magistrate and the S S P Allahabad but no steps were taken The informant was a poor girl belonging to Mallah caste and was aged about 16 years She had been married but Gauna ceremony had not been performed

2 It appears from the record of the case that the S S P Allahabad passed an order on 8 6-87 directing C O Meja to get the case registered and take necessary action C O Meja then passed an order on 10-6-87 directing S O of P S Meja to register the case and take necessary steps Thereafter the case was registered at P S Meja on 18-6-87 as Crime No 97 of 1987 under Section 376 IPC against the applicant Chinta Mani Tripathi and investigation was entrusted to Dalip Singh. S I

3 It appears from the record that the application moved by the applicant for surrender before J M I Allahabad was rejected as he did not appear on the date fixed He later on moved a petition under Section 482, Cr P C in the High Court on the allegation that he was ill and was admitted in Swarup Rani Nehru Hospital, Allahabad The High Court gave a direction that the applicant be taken into custody in the hospital in Crime No 97 of 1987 under Section 376 IPC The applicant moved an application for bail which was allowed by the Incharge Sessions Judge Allahabad on 13 8 1987 The complainant then moved an application for cancellation of bail granted to the applicant on 3-9-87 which was allowed and the bail granted to the applicant did not surrender and filed Crl Misc. Application No 1251 of 1988 in this Court under Section 482, Cr P C It was admitted on 9 2 1988 and the operation of the order dated 5-2 88 passed by the learned Sessions Judge was stayed On 7-3-90 the petition was finally disposed of with the direction that the bail cancellation application should be reheard by the learned Sessions Judge and be decided in accordance with law The bail cancellation application was heard again and Shri B N B Asthana, Sessions Judge, Allahabad, by his order dated 20-6-1990 cancelled the bail granted to the applicant in Crime No 97 of 1987 The applicant did not surrender and he moved Misc Application No 7109 of 1990 under Section 482, Cr P C in this court challenging the order dated 20 6-1990 passed by the learned Sessions Judge, Allahabad On 28 6-1990 this court issued notice to the opposite parties to file counteraffidavit and stayed the arrest of the applicant till 9 8 1990 This stay order was extended from time to time till 30 11 1990 Thereafter the stay order was not extended

4 The applicant also gave notice of a

bail application to the Government Advocate of the High Court vide notice No 5263 of 25 6 1990 However, the bail application was not presented in the court after the expiry of the period of notice and it was filed for the first time before the Joint Registrar, as required by the rules, on 3-12 1990 The bail application came up for consideration before Hon ble B P Singh, J On 4 12 1990 when His Lordship directed that the matter be placed before some other Hon'ble Judge After nomination by the Hon'ble the Chief Justice the bail application was come up for hearing before me

5 Sri A K Shukla, learned counsel for the complainant has contended that although the bail of the applicant had been cancelled on 20 6 1990 but he did not surrender The notice of the present bail application was given on 25 6 1990 when the applicant had not surrendered and he was not in custody Learned counsel has thus contended that the application for bail was liable to be rejected on this ground alone Shri Viresh Mishra, learned counsel for the applicant has contended that the applicant surrendered on 4 12 1990 and he has filed a questionnaire showing that the applicant did surrender on the said date He has contended that on the date when the bail application came up before Hon ble B P Singh, J on 4-12 90 the applicant had surrendered and was in custody

6 In order to appreciate the rival contentions it will be useful to notice that relevant provisions of the Rules of Court Sub-rule (1) of Rule 18 of Chapter XVIII of the Rules of Court reads as follows —

> "No application for bail shall be entertained unless accompanied by a copy of judgment or order appealed against or sought to be revised and a copy of the order passed by the Sessions Judge on the bail application for the applicant and unless the accused has surrendered except where he has been released on bail after conviction under Section 398(3) of the Code of Criminal Procedure, 1973 "

The requirement of the rule, therefore, is that before the bail application is entertained the accused should have surrendered The questions what is the meaning of the word 'entertained in sub-rule (1) Does it mean that a bail application is entertained on the date when the notice of the same is given to the Government Advocate or on the date when it comes up for hearing before the Court? The word "entertained" has been used in other statutes as well where it has come up for interpretation In Dhoom Chand v Chaman Lal (AIR 1962 All 543) (1962 All LJ 729) a Division Bench of this court has held that the word "entertain" in its application to Cl (b) to proviso to O 21, R 90 CPC, bears the meaning of admitting to consideration In Kundan Lal v Jagan Nath (AIR 1962 All 547) (1962 All LJ 574) it was held as follows (at page 548 of AIR 1962 All) —

> The use of the word entertain" in the proviso (All) to O 21, R 90 denotes a point of time at which an application to set aside the sale is heard by the court The expression "entertain" does not mean the same thing as the filing of the application or admission of the application by the Court A court hearing an application under O 21 R 90 can only be said to entertain the application when it is actually disposing of the application on merits and the mere filing of the application by the judgment debtor would not be its entertainment by court "

7 The word 'entertain' again came up for consideration before the Supreme Court in M/s Lakshmiratan Engineering Works Ltd v Asst Commissioner, Sales Tax (AIR 1968 SC 488) in reference to S 9 of the U P Sales Tax Act The proviso to sub-section (1) of S 9 read as follows —

> "Provided that no appeal against an assessment shall be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due or of such instalments thereof as may have become payable "

In this case the appellants filed an appeal on May 16, 1966, against the order of assessment and demand notice which was served upon them on April 16, 1966, and the appeal was thus filed within time However, the appellants had deposited the admitted tax on April 26, 1966 but they did not file any proof of such deposit The certificate of having deposited the tax was filed by the appellants on January 24, 1967 The Asstt. Commissioner rejected the appeal on the ground that the appellants had not complied with the requirements of Section 9 as they did not file the proof of having deposited the tax along with the memo of appeal. In para 7 of the report the Supreme Court observed as follows (at page 491 of AIR 1968 SC)

"To begin with it must be noticed that the proviso merely requires that the appeal shall not be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due A question thus arises that is the meaning of the word 'entertained' in this context? Does it mean that no appeal shall be received or filed or does it mean that no appeal shall be admitted or heard and disposed of unless satisfactory proof is available? The dictionary meaning of the word 'entertain' was brought to our notice by the parties, and both sides agreed that it means either 'to deal with or admit to consideration" We are also of the same opinion The question, therefore, is at what stage can be appeal be said to be entertained for the purpose of the application of the proviso? It is 'entertained' when it is filed or is it 'entertained when it is admitted and the date is fixed for hearing or is it finally 'entertained' when it is heard and disposed of?"

After considering the various decisions of the Allahabad High Court the Supreme Court observed as follows in para 10 of the report (at page 492 of AIR 1968 SC)

"In our opinion these cases have taken a correct view of the word 'entertain' which according to dictionary also means 'admit to consideration' It would therefore appear that the direction to the court in the proviso to Section 9 is that the court shall not proceed to admit to consider an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax This will be when the case is taken up by the court for the first time"

In sub-rule (1) of R 18 of Chapter XVIII the words used are not that the application for bail shall be 'filed' or 'received" but the words are 'shall be entertained" Therefore, the proper interpretation of sub-rule (1) would be that no application for bail shall be "admitted for consideration' unless the accused had surrendered This will be at the time when the bail application is taken up for consideration by the court for the first time In the present case the applicant had surrendered in 4-12 1990 when the bail application came up for consideration As such the present bail application is maintainable and cannot be rejected on the ground that the notice of the application for bail was given to the Government Advocate at a time when the accused had not surrendered

8 It may be pointed out that the contingency that an accused may be given notice to the Government Advocate before surrendering can arise only in a case where his bail has been cancelled by the learned Sessions Judge In a case where the accused applies for bail in the High Court after his bail application has been rejected by the learned Sessions Judge, he would be in custody as he would have moved the bail application before the Sessions Judge only after he had surrendered or had been taken into custody Sub-rule (2) of Rule 18 provides that in every application for bail in a case which is under investigation or which is pending in a lower court it shall be stated whether any application for bail had or had not been previously made before the magistrate or the Sessions Judge concerned and the result of such application if any Similarly sub-rule (1) requires that a copy of the order passed by the Sessions Judge on the bail application shall be filed along with the bail application moved in this court. It is therefore, obvious that the accused would be in custody at the time when he gives notice of the bail application to the Government Advocate when he appeals for bail in the High Court after rejection of his bail application by the Sessions Judge

9 Learned counsel for the complainant has contended that in view of cl (a) of sub-rule (3) and cl (b) of sub-rule (4) of R 18 of Chapter XVIII of the Rules of court the present bail application is liable to be rejected Cl (a) of sub-r (3) provides that 'save in exceptional circumstances' no order granting bail shall be made on an application unless notice thereof has been given to the Government Advocate and not less than ten days have elapsed between the giving of such notice and the hearing of such application Cl (b) of sub-rule (4) proviso that every application for bail shall state the date of the applicant's arrest In the present case, in the original bail application notice whereof was given to the Government Advocate on 25-6-1990, the provision of cl (b) of sub-rule (4) were not complied with in as much as the date of the applicant's arrest was not mentioned Since the applicant had not surrendered, in the bail application this fact was deliberately omitted to be mentioned The applicant has filed a supplementary affidavit on 10-12-1990 wherein it is mentioned that he surrendered before the A C J M Allahabad on 4-12-1990 at 11 a m Learned counsel for the complainant has contended that as the supplementary affidavit was filed on 10-12-1990 the period of ten days have not elapsed and therefore the bail application should not heard Learned counsel for the applicant has on the other hand contended that the provisions of sub-rule (3) and sub-rule (4) are not mandatory but are merely directory in nature

10 So far as sub-r (3) is concerned it starts with the words "Save in exceptional circumstances " It is therefore obvious that in 'exceptional circumstances' the bail application could be heard even though the period of ten days has not elapsed between the giving of the notice of the bail application to the Government Advocate and its hearing by the court The court may in an appropriate case hear the bail application even before the expiry of the prescribed period of ten days The position in sub-r (4) is however different Sub-r (4) starts with the words "Every application for bail shall show It shall also state the following for particulars, namely The date of the applicant's arrest " Therefore, the word 'shall' has been used twice in sub-r (4) The use of the word 'shall' raises a presumption that a particular provision is imperative as has been held by the Supreme Court in the case of State of U P v Baburam (AIR 1961 SC 751) and State of U P v Man Bodhan Lal (AIR 1957 SC 912) It is, therefore, mandatory that the bail application must mention the date of the arrest of the applicant In case the bail application does not disclose that the applicant is in custody the same day be rejected on this ground

11 In the present case in the bail application, notice of which was given on 28-6-1990, the date of arrest of the applicant was not mentioned This was done by means of an affidavit filed on 10-12-1990 The question is whether the bail application should be rejected on this ground alone In my opinion there are some exceptional circumstances due to which it will not be proper to reject the bail application on account of non-compliance of cl (b) of sub-r (4) After the bail of the applicant was cancelled on 20-6-1990 he filed a petition u/S 482, Cr P C being Cl Misc Application No 7109 of 1990 in the High Court wherein the operation of the order dated 20-6-1990 was stayed on 28-6-1990 This stay order remained operative till 30-11-1990 It appears from the record that the petition u/S 482, Cr P C was heard on several dates in the month of November, 1990 In view of this special feature of the case I am of opinion that it will not be proper to reject the bail application only on the ground that the date of the applicant's arrest was not mentioned therein The fact remains that subsequently the applicant has filed a supplementary affidavit and has complied with the requirements of cl (b) of sub-r (4) of the Rules of court Although I am of opinion that the provisions of cl (b) of sub-r (4) are mandatory and in case of non-compliance thereof the bail application will be liable for rejection but in an exceptional case the court may entertain a bail application where the date of arrest of the applicant has not been mentioned However there must be material

on record to show that at the time when the application is taken into consideration the accused was in custody

12 The applicant was initially granted bail by the Incharge Sessions Judge, Allahabad, and his bail has been subsequently cancelled Learned counsel for the applicant has submitted that the cancellation of the bail application was wholly unwarranted on the facts and circumstances of the present case The consideration for cancellation of bail are entirely different from the considerations which weigh with the court at the time of the grant of bail In Delhi Administration v Sanjay Gandhi (AIR 1978 SC 961) (1978 Cri LJ 952) it was observed as follows (at page 965 of AIR 1978 SC) —

> ' Rejection of bail when bail is applied for is one thing, cancellation of bail already granted is quite another It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial "

Similarly in Bhagirathsinh Judeja v State of Gujarat (1984 Cri LJ 160) (AIR 1984 SC 372) the Supreme Court has held as follows (at page 161 of 1984 Cri LJ) —

> "Very cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail It is now well settled by a catena of decisions of the Supreme Court that the power to grant bail is not to be exercised as if the punishment before trial is being imposed The only material considerations in such a situation are whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with evidence

The facts of the present case show that although the incident is alleged to have taken place on 20-5-1987, a written report to S S P was made after more than a fortnight on which an order was passed by the S S P on 8-6-1987 The precise date on which the complaint was made is not known The medical examination of the victim Shiva Devi was conducted on 30-6-1987, forty days after the occurrence The doctor opined that there was no evidence of rape Since the medical examination was done after a very long delay the medical examination report is of no value No inference either in favour of the prosecution or in favour of defence can be drawn on its basis The reasons for making a complaint to S S P after inordinate delay, as mentioned in the first information report, is that the applicant used to sit with a gun at the house of the informant and did not permit anybody to go out It is also alleged that someone or the other from the side of the applicant used to block the way due to which nobody could go to lodge the FIR Whether the explanation given by the informant for making the complaint after a fortnight is convincing or not can only be considered after evidence has been adduced in the trial, but the fact remains that the FIR was lodged after a fortnight of the alleged commission of the crime It is also averred in para 6 of the affidavit that the applicant is aged about 57 years He has got his wife, six children including two married daughters and several grand children Prima facie on these facts the applicant is entitled to bail

13 The learned Sessions Judge has cancelled the bail of the applicant on the ground that the accused has tried to terrorise and pressurise the informant in order to prevent the witnesses from giving evidence against him and that there is a reasonable apprehension that he will interfere with the course of justice if he was allowed to remain on bail In support of the bail cancellation application Ram Charan, father of the victim Shive Devi had filed an affidavit stating that after the applicant had been released on bail he was continuously harassing and torturing the witnesses and other family members of the complainant It was also brought on record on behalf of the complainant that one Ram Kishan had lodged a FIR u/S 324, IPC

against the applicant and two others on 11-10-1987 Learned counsel for the applicant has submitted that Ram Kishan is not an eye-witness in the present case He has also submitted that although the applicant was released on bail more than three years back on 13-8-1987 but there is nothing on record to show that he had acted in any manner so as to tamper with the prosecution witnesses He further submitted that the case u/S 376, IPC has not yet been committed to the court of Sessions

14 I have considered the rival contentions advanced by the parties The record of the present bail application does not show that Ram Kishan, who lodged the FIR against the applicant on 11-10-1987 is in any way connected with the present case under S 376, IPC In the first information report his name is not mentioned as an eye-witness of the incident The record does not show that he is in any way connected with any of the eye witnesses of the present incident Apart from the FIR lodged by Ram Kishan no other FIR was lodged against the applicant during this period of three years After October, 1987, no objectionable act is attributed to the applicant It is, therefore, clear that the applicant has not misused the privilege of bail granted to him during this period

15 Another aspect which has to be considered is that the case has not yet been committed to the court of Sessions although nearly three and a half years have elapsed Learned counsel for the complainant submitted that the victim cannot be held responsible for the delay in the commitment of the case Nevertheless the fact remains that the case has not yet been committed to the court of Sessions and there is no possibility of the Sessions trial concluding in the near future In case the applicant is not granted bail he will have to remain in jail for an indefinitely long period

16 Taking into consideration the entire facts and circumstances of the case I am of opinion that the applicant is entitled to bail Let applicant Chinta Mani Tripathi alias Chhotey Lal be released on bail in Crime No 97 of 1987 u/S 376, IPC P S Meja, Allahabad, on furnishing two sureties and a personal bond to the satisfaction of CJM, Allahabad

Application allowed

1991 ALL L J 688

= 1991 CRI L J 1669

G P MATHUR, J

Pratap S/o Chandan Singh and others, Petitioners v State of Uttar Pradesh, and others, Respondents

Criminal Revision No 1878 of 1990, D/- 23-11-1990

(A) Criminal P C (1974), Ss 190(1)(b), 173, 200 and 202 — Case registered on basis of FIR — Final report submitted by Police — Protest petition filed by complainant before magistrate contending that final report was filed on unjustifiable grounds — Magistrate rejecting final report and summoning accused person to face trial — Procedure u/Ss 200 and 202 not following prior to issue of summonses — Order is not illegal

1980 Cri LJ 1308 and 1989 Cri LJ 963, Followed (Para 4)

(B) Criminal P C (1974), Ss 190(1)(b), 200 and 202 — Case registered on basis of FIR — Final report submitted by Police — Magistrate rejecting final report and issuing summonses to accused — Accused is not entitled to hearing prior to issue of process

The accused has got no right to be heard at a stage prior to issue of process against him Neither under the Code of Criminal Procedure nor under any principle of natural justice the magistrate is required to issue notice or afford on opportunity of hearing to an accused in a case where the police has submitted final report but on consideration of the material on record the magistrate takes cognizance of the offence in exercise of his powers u/S 190(1)(b) and directs issue of process to the accused The Code does not contemplate holding of two trials one before the issue of process and the other after the process is issued

Case law discussed (Para 16)

Where a magistrate issues process against an accused he is merely initiating a procedure The accused is directed to appear in the court to face trial After the accused has put in appearance he will be tried in accordance with the procedure prescribed by the Code No principle of natural justice requires that at the stage of initiating proceeding an opportunity of hearing should be given to a person (Para 12)

The legislature has taken extreme care and has made elaborate procedure to give full opportunity to an accused once the trial begins in the court of law Art 21 of the Constitution lays down that no person shall be deprived of his life or personal liberty except according to the procedure established by law It is thus, clear that weight must be given to the statutory procedure and to the purpose it is intended to achieve Since the Code provides for an elaborate procedure for the trial of an accused it will not be proper to hold that an accused has got a right of hearing at the stage of issue of process against him by applying principles of natural justice (Paras 9 11)

Cases Referred .	**Chronological Paras**
1989 Cri LJ 963 AIR 1989 SC 885	4
1986 Cri LJ 1515	14
1985 Cri LJ 1521 AIR 1985 SC 1285	5, 13
1980 Cri LJ 1308 AIR 1980 SC 1883	4
1968 Cri LJ 97 AIR 1968 SC 117 1968 All LJ 373	4
1963 (2) Cri LJ 397 AIR 1963 SC 1430	15
CMA No 6108 of 1988 D/- 21-6-88	14
(1863) 14 CBNS 180	12
(1981) 2 All ER 246	12
(1972) 1 WLR 534 HL	12
(1972) 2 All ER 6	12
(1969) 3 All ER 275	12
(1969) 3 All ER 277 (1971) AC 297	11

Sri Tej Pal, Advocate, for the Petitioners, S C for the Respondents

1991 All L J /44 VIII (2)

ORDER — This criminal revision has been filed challenging the order dated 22-8-1990 passed by the XIII ACJM Agra, in Misc Case No 8 of 1990 summoning the accused applicants to face trial u/S 307/323/504 IPC

2 Mohan Singh, respondent No 2, lodged a first information report on 20-8-1988 at P S Kheragarh, Distt Agra, alleging that the accused applicants assaulted Ram Ratan and his mother Smt Bhagawati at about 8 a m on 20-8-1988 Both the injured namely Ram Ratan and Smt Bhagwati were medically examined at the Primary Health Centre and injuries were found on their person Smt Bhagwati died two days after the incident A case was registered a Crime No 108 of 1988 on the basis of the first information report lodged by Mohan Singh and investigation commenced Subsequently the police of P S Kheragarh submitted final report of 3-11-1988 The complainant Mohan Singh filed a protest petition before the learned magistrate and contended that the final report had been submitted by the Investigating Officer on unjustifiable grounds The learned magistrate, after hearing the complainant, passed an order on 22-8-1990 rejecting the final report and further directed that the accused-applicants be summoned to face trial under Ss 307/323/504 IPC it is this summoning order which has been challenged by the accused applicants in the present revision

3 The first contention of Shri Tej Pal, learned counsel for the applicants is that the learned magistrate has erred in summoning the applicants when the police had submitted a final report He has also contended that the complainant Mohan Singh had merely filed a protest petition but the procedure prescribed in Chapter XV Cr P C (hereinafter referred to as the Code) had not been followed inasmuch as neither the statement of the complainant was recorded u/S 200 nor the statement of witnesses was recorded u/S 202 of the Code According to the learned counsel the learned magistrate acted wholly illegally in issuing process against the accused applicants as the procedure prescribed by law had not been followed

4 The point raised by learned counsel for the applicants is fully covered by the decisions of the Supreme Court in Abhinandan Jha v Dinesh Misra (1968 Cri LJ 97) (AIR 1968 SC 117) and H S Bens v State (1980 Cri LJ 1308) (AIR 1980 SC 1883) In both these cases it was held that a magistrate on receiving a police report u/S 173, Cr P C to the effect that no case is made out against the accused may take cognizance of the offence under S 190(1)(b) of the Code on the basis of the police report and issue process He may do so without being bound in any manner by the conclusion arrived at by the police in their report The controversy was again considered in detail by the Hon'ble Supreme Court in M/s India Carat Pvt Ltd v State of Karnataka (1989 Cri LJ 963) (AIR 1989 SC 885) and it was held as follows (at pages 967, 968 of 1989 Cri LJ) —

> "Upon receipt of a police report u/S 173(2) a Magistrate is entitled to take cognizance of an offence u/S 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused S 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers u/S 190(1)(b) and direct the issue of process to the accused The Magistrate is not bound in such a situation to follow the procedure laid down in Ss 200 and 202 of the Code for taking cognizance of a case u/S 190(1)(a) though it is open to him to act u/S 200 or S 202 also"

Therefore, there is no merit in the first submission made by learned counsel for the applicants and the impugned order cannot be set aside on that ground

5 Learned counsel for the applicants next contended that on the principles of natural justice the learned magistrate should have issued notice to the accused and should have given them an opportunity of hearing before passing the summoning order as there was report in their favour by the investigating officer to the effect that they had committed no offence The learned counsel submitted that in case the learned magistrate was not inclined to agree with the report of the Investigating Officer and accept the same he should have given an opportunity of hearing the accused before taking a contrary view and issuing process against them He further argued that if on the strength of the Supreme Court decision in the case of Bhagwant Singh v Commissioner of Police (1985 Cri LJ 1521) (AIR 1985 SC 1285) the informant complainant will be heard it does not sound appropriate that the accused will not be heard even though the investigating agency had given a report in his favour

6 The contention raised by the learned counsel for the applicants has raised a serious question as to whether the principles of natural justice will apply in a case where an accused is being tried in a court of law in accordance with the procedure prescribed by the Code

7 "Natural justice" is an expression of English common law and involves a procedural requirement of fairness The doctrine is based on two broad principles resting on Latin maxims (1) Nemo Debet Esse Judex in Propria Cause, and (2) Audi Alteram Partem, The first maximim means that no-one should be a judge in his own cause or that the Tribunal must be impartial and without bias The second maxim means-hear the other side or that both sides in a case should be heard before it is decided or that no man should be condemned unheard It is the second rule of natural justice, which lays down that a man has a right to be heard before a decision adversely affecting him is taken, is to be examined in the present case

8. Section 4(1) of the Code provides that

all offences under the Indian Penal Code shall be investigated, inquired into tried and otherwise dealt with according to the provisions contained in the Code Chapter XVI of the Code deals with commencement of proceedings before the magistrate S 204 provides that if in the opinion of the magistrate, taking cognizance of an offence, there is sufficient ground for proceeding, he may issue summons or warrant, as the case may be, for attendance of the accused Therefore before issuing summons or warrant against the accused, the magistrate taking cognizance of an offence, has to form an opinion on the limited question as to whether there is sufficient ground for proceeding When process is issued by a magistrate the person concerned is not being condemned in any manner The order issuing process does not adversely effect the accused He is neither being convicted nor sentenced He is merely being asked to face trial in a court of law It cannot be said that merely because process has been issued against a person, a decision adversely affecting him has been taken It cannot, therefore, be said that any principle of natural justice is infringed, if the Magistrate issues process against a person without first affording him an opportunity of hearing

9 The legislature has taken extreme care and has made elaborate procedure to give full opportunity to an accused once the trial begins in the court of law Art 21 of the Constitution lays down that no person shall be deprived of his life or personal liberty except according to the procedure established by law

10 The various provisions of the Code may now be briefly noticed which ensure that an accused will get fair hearing S 207 of the Code provides that in a case where proceeding has been instituted on a police report the magistrate shall furnish to the accused free of cost, copies of police report and various other documents Chapter XVIII of the Code provides the procedure of trial before a court of sessions S 226 provides that when the accused appears before the court the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused S 228 provides that if upon consideration of the documents and hearing the submissions of the accused and the prosecution the judge is of opinion that there is ground for presuming that the accused has committed an offence he shall frame, in writing, a charge against the accused Thus before the commencement of the trial an accused is furnished with copies of the first information report statement of witnesses recorded u/S 161 of the Code and other relevant documents including police report He is also given an opportunity of hearing before the charge is framed against him S 211 ~~of the Code~~ provides the manner in which charge shall be framed against an accused and S 212 provides that the charge shall contain such particulars as to the time and place of the alleged offence and the person against whom, or the thing in respect of which, it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged S 213 provides that when the nature of the case is such that the particulars mentioned in S 211 and S 212 do not give the accused sufficient notice of the matter, the charge shall contain such particulars and the manner in which the alleged offence was committed as will be sufficient for that purpose S 231 provides for recording of the prosecution evidence and sub-cl (2) thereof provides that the judge may permit the cross-examination of any witness until any other witness has been examined or recall any witness for further cross-examination S 233(1) gives a right to an accused to adduce any evidence in support of his defence Sub-s (2) of S 233 gives a right to the accused to file written statement and sub-s (3) provides that if an accused applies for the issue of a process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process U/S 313 of the Code the accused is given opportunity to explain circumstance appearing in the evidence against him S 234 provides that the accused or his pleader shall be entitled to give reply to the submission made by the prosecutor after the examination of the witnesses is complete Sub-sec (2) of S 235 provides that if the accused is convicted, the judge shall hear him on the question of sentence Almost similar provisions have been made in Chapter XIX and Chapter XX for trial of warrant cases and summons cases by magistrate It may be pointed out that S 302, Cr P C gives a right to an accused to engage a lawyer of his choice for his defence and S 304, Cr P C provides that the court is bound to assign a pleader for the defence of the accused at the expense of the State in case he is not represented by a pleader Thus it is clear that the legislature has taken ample care to ensure that an accused gets full right of hearing and a fair trial during the course of his trial before a court of law

11 The Code does not provide for issue of notice or giving an opportunity of hearing to an accused at the stage of issue of process It is to be examined whether such a right can be given to accused even though the legislature in its wisdom did not think it proper to do so The courts have provided procedural safeguards by applying principles of natural justice where parliament has not laid down any procedure But where Parliament has laid down a procedure Court will not ordinarily introduce additional safeguards unless there are some compelling reasons to do so In Wiseman v Borneman (1969) 3 All ER 275 at p 277 (1971) ACC 297) it was held as follows —

" Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation "

It is thus clear that weight must be given to the statutory procedure and to the purpose it is intended to achieve Since the Code provides for an elaborate procedure for the trial of an accused, in my opinion, it will not be proper to hold that an accused has got a right of hearing at the stage of issue of process against him by applying principles of natural justice

12 Where a magistrate issues process against and proceeds he is merely initiating a procedure The accused is directed to appear in the court to face trial After the accused has put in appearance he will be tried in accordance with the procedure prescribed by the Code No principle of natural justice requires that at the stage of initiating proceedings an opportunity of hearing should be given to a person In Foulkes' Administrative Law, Sixth Edition, it has been observed as follows at page 239 —

"Where the administration is merely initiating a procedure or seeking to establish whether a prima facie case exists, the courts will not be likely to extend the statutory procedure at least where it gives a full opportunity to be heard later in the proceedings In Wiseman v Borneman (1971) AC 297, (1969) 3 All ER 275 a tribunal's function was to decide whether, on the basis of documents submitted to it by the taxpayer and by the Inland Revenue there was a prima facie case for the Revenue to recover unpaid tax The House of Lords held that the taxpayer was not entitled to see and answer the statements in the Revenue's documents to the tribunal. But some of the judgments suggest that procedure would not have been adequate if the tribunal had been entitled to pronounce a final judgment, in that case the courts could supplement it as in Cooper v Wandsworth Board of Works (1863) 14 CBNS 180) Likewise, in Pearlberg v Varty (1972) 2 All ER 6, (1972) 1 WLR 534, HL) the taxpayer was not entitled to be heard before a commissioner gave leave for an assessment of tax to be made against him The opportunity to be heard would come later in the course of the proceedings Thus in Wiseman v Borneman Lord Reid said

Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him So there is nothing inherently unjust in reaching such a decision in the absence of the other party

In R V Raymond it was held that the rule requiring a hearing was inapplicable to the process of preferring a bill of indictment, the defendant would have an opportunity of being heard at his trial (1981) 2 All ER 246 "

13 Learned counsel for the applicants placed strong reliance on the case of Bhagwant Singh v Commissioner of Police (1985 Cr LJ 1521) (AIR 1985 SC 1285) for his contention that opportunity of hearing should have been given to the accused before issuing process as the final report had been submitted in their favour In Bhagwant Singh's case (supra) the principle of giving notice to informant, who has lodged the first information report, before accepting the final report was laid down not on the principles of natural justice but on the basis of provisions of the Code The Hon'ble Supreme Court held that Ss 154(2), 157(2) and 173(2)(ii) of the Code show that the first informant must be given the opportunity of hearing at the time of the consideration of the final report The Hon ble Supreme Court has held as follows in para 3 (at page 1523, 1985 Cri LJ —

"It will be seen from the provisions to which we have referred in the preceding paragraph that when an informant lodges the first information report with the officer in charge of a police station he does not fade away with the lodging of the First Information Report. He is very much concerned with what action is initiated by the officer in charge of the police station on the basis of the First Information Report lodged by him No sooner he lodges the First Information Report, a copy of it has to be supplied to him free of cost, u/sub-sec (2) of S 154 If, notwithstanding the First Information Report, the officer in charge of a police station decides not to investigate the case on the view that there is no sufficient ground for entering on an investigation, he is required u/sub-sec (2) of S 157 to notify the information the fact that he is not going to investigate the case or cause it to be investigated Then again the officer in charge of a police station is obligated u/sub-sec (2)(ii) of S 173 to communicate the action taken by him to the informant and the report forwarded by him to the Magistrate u/sub-sec (2)(i) has therefore to be supplied by him to the informant The question immediately arises as to why action taken by the officer in charge of a police station on the First Information Report is required to be communicated and the report forwarded to the Magistrate u/sub-sec (2)(i) of S 173 required to be supplied to the informant Obviously the reason is tha the informant who sets the machinery of investigation into motion by filing the First Information Report must know what is the result of the investigation initiated on the basis of the First Information Report The informant having taken the initiative in lodging the First Information Report with a view to initiating investigation by the police for the purpose of ascertaining whether any offence has been committed and if so by whom is vitally interested in the result of the investigation and hence the law requires that the action taken by the officer in charge of a police station on the First Information Report should be communicated to him, and the report forwarded by such officer to the Magistrate u/sub-sec (2)(i) of S 173 should also be supplied to him (Emphasis supplied)

The dictum that the first informant should be given a notice was laid down on the basis of the provisions of the Code and not on any principle of natural justice will be clear from the fact that while considering the question as to whether any notice should be given to the injured person or a relative of the deceased who is not the informant, the Court ruled that there was no obligation on the part of the magistrate to issue such a notice either under the provisions of the Code or under the principles of natural justice It will be useful to quote the observation made by the Supreme Court in para 5 of the report —

"The position may, however be a little different when we consider the question whether the injured person or a relative of the deceased, who is not the informant, is entitled to notice when the report comes up for consideration by the Magistrate We cannot spell out either from the provisions of the Criminal P C, 1973 or from the principles of natural justice any obligation on the Magistrate to issue notice to the injured person or to a relative of the deceased for providing such person an opportunity to be heard at the time of consideration of the report, unless such person is the informant who has lodged the First Information Report But even if such person is not entitled to notice from the Magistrate, he can appear before the Magistrate and make his submissions when the report is considered by the Magistrate for the purpose of deciding what action he should take on the report The injured person or any relative of the deceased, though not entitled to notice from the Magistrate, has locus to appear before the Magistrate at the time of consideration of the report, if he otherwise comes to know that the report is going to be considered by the Magistrate and if he wants to make his submissions in regard to the report the Magistrate is bound to hear him We may also observe that even though Magistrate is not bound to give notice of the hearing fixed for consideration of the report to the injured person or to any relative of the deceased, he may, in the exercise of his discretion, if he so thinks fit, give such notice to the injured person or to any particular relative or relatives of the deceased but not giving of such notice will not have any invalidating effect on the order which may be made by the Magistrate on a consideration of the report " (Emphasis supplied)

14 Learned counsel for the applicants lastly urged that Hon'ble P Basu, J has referred Criminal Misc Application No 6108 of 1988 (Ram Adhin Sharma v State) for decision by a Division Bench by his order dated 21-6-1988 where, according to learned counsel, similar question of law was involved and, therefore this revision petition be admitted He also placed reliance upon the case of Hardeo Singh Sandhu v State of Rajasthan (1986 Cri LJ 1515) I have examined the record of the case of Ram Adhin Sharma and that case has not yet been heard by the Division Bench In my opinion the cases of Ram Adhin Sharma as well as Hardeo Singh Sandhu are clearly distinguishable on facts In the case of Ram Adhin Sharma police submitted final report and the complainant filed a protest petition The accused, on coming to know of the filing of the protest petition, themselves put in appearance in court and asserted their right by moving an application to the effect that since the investigating agency had found that the accused had not committed any offence the final report should not be rejected unless they were heard The learned Sessions Judge rejected the application and the prayer made by the accused and this order was challenged in this Court Similarly in Hardeo Singh Sandhu's case the prayer of the accused to be heard was rejected by the learned magistrate In the present case admittedly the accused neither appeared nor moved any application before the magistrate for giving them opportunity of hearing The contention of the learned counsel for the applicant is that although the accused had neither appeared nor had moved any application but still the magistrate on his own should have issued notice to the accused in case he was not inclined to accept the final report Therefore the cases of Ram Adhin Sharma as well as of Hardeo Singh Sandhu are clearly distinguishable on facts

15 In the end it may be mentioned here that in Chandra Deo v Prakash Chandra (1963(2) Cr LJ 397) (AIR 1963 SC 1430) the Supreme Court has clearly ruled that an accused does not come into picture at all nor he has any right to take part in the proceedings till process is issued The Court observed as follows in para 7 (at page 400, 1963(2) Cri LJ —

"Taking the first ground, it seems to us clear from the entire scheme of Ch XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued This does not mean that he is precluded from being present when an enquiry is held by a Magistrate He may remain present either in person or through a counsel or agent with a view to be informed of what is going on But since the very question for consideration being whether he should be called upon to face an accusation, he had no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so " (Emphasis supplied)

16 In view of the discussion made above I am clearly of the opinion that the accused has got no right to be home at a stage prior to issue of process against him Neither under the Code of Criminal Procedure nor under any principle of natural justice the magistrate is required to issue notice or afford and opportenity of hearing to an accused in a case where the police has submitted final report but on consideration of the material on record the learned magistrate takes cognizance of the offence in exercise of his powers u/S 190 (I)(b) and directs issue of process to the accused The Code does not contemplate holding of two trials one before the issue of process and the other after the process is issued As such there is no merit in this revision It is accordingly rejected

Revision dismissed

1991 ALL L J 695

= 1991 Cri L J 1825

H C MITAL AND G D DUBEY, JJ

Ram Nath and others, Appellants v State, Respondent

Criminal Appeal No 685 of 1978, D/-30-11-1990 *

Penal Code (1860), Ss 96 and 102 — Free fight — Accused persons receiving injuries and one of them receiving even incised wound — Deceased and other persons on the other side receiving injuries caused by lathis or Dandas — It cannot be said that accused had exceeded their right of self defence — Conviction of accused persons for offences u/Sections 304, 323 read with S 34 has to be set aside **(Para 13)**

Cases Referred Chronological	**Paras**
1990 Cri LJ 1510 AIR 1990 SC 1459 1990 All LJ 415	10, 12
1975 Cri LJ 1479 AIR 1975 SC 1674	11
1952 Cri LJ 848 AIR 1952 SC 165	11

Sri P N Misra Advocate for Appellants, A G A, for Respondent

H C MITAL, J — The above two appeals have been preferred against the judgment and order dated 3-3-1978 passed by Sri Sushil Kumar, the then Ist Addl District and Sessions Judge, Bijnor, convicting the appellants Ram Nath, Raghunath Singh and Buddhu Singh u/Ss 304 and 323 both read with S 34, IPC and sentencing them to five years and six months rigorous imprisonment respectively Sri Sushil Kumar acquitted Dharampal Singh of the charge u/Ss 302, 323 and 325 read with S 34, IPC On being aggrieved the State has preferred appeal No 1634 of 1978 against all the accused as in its view all of them should have been found guilty and convicted u/Ss 302 and 325 both read with S 34, IPC, while the convict appellants Buddhu Singh, Ram Nath and Raghunath Singh have preferred their appeal against their conviction u/Ss 304 and 323 both read with S 34 IPC

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*Against the order passed by Shri Sushil Kumar Ist Addl Dist & Sessions J, Bijnor, D/- 3-3-1978

2 The facts of the case in brief are that the parties are residents of village Jamalpur Pathani P S Kotwali Bijnor Chaman Singh (deceased) and Buddhu Singh were real brothers Accused Raghunath Singh and Ram Nath are sons of Buddhu Singh while accused Dharampal Singh is nephew of Buddhu Singh Chaman Singh had sold one and a half Bigha of land of joint Khata to Ram Singh and Karera a few months before the occurrence Buddhu Singh accused wanted that the land should not be sold to an outsider as he wanted to purchase it himself Hence the relation in between them became strained It is said that on 7-7-1974 exchange of abuses had taken place in between them Thereupon Buddhu Singh had threatened that he would settle the matter with Chaman Singh On 8-7-1974 at about 8 a m when Chaman Singh was scraping grass in his field while Jasram was ploughing it the accused Buddhu Ram Nath Raghunath and Dharampal Singh all armed with Lathis attacked Chaman Singh and when Jasram intervened to save his father he also received Lathi injuries On the alarm raised by Jasram witnesses including Ram Singh Karera, Dal Singh and Om arrived there and thereafter the accused left Chaman Singh was taken to the police station in a bullock cart but he succumbed to his injuries on the way Oral report of the occurrence was lodged at P S Kotwali Bijnor at a distance of three and a half miles at 10-45 a m on the basis of which case u/S 302/323, IPC was registered against the accused and investigation started Injuries of Jasram were examined on the same day at 1-50 p m at District Hospital Bijnor by Dr H U K Zuberi and he found the following injuries on his person, vide injury report (Ex Ka-11)

1 Double line contusion 3" x 1" on outer side of right arm middle part

2 Contusion 3" x ½" on right arm outer side ½ below injury No 1

3 Contusion 3" x ½" on front of right shoulder joint red

4 Contusion 2" x 1" on outer side of right arm upper part, red

5 Contusion 5 x 1½" on back of right shoulder joint red 6 Contusion 2 x 1 on back of right shoulder joint red

7 Contusion 5" x 1" on back of right side upper part, red

8 Abraded contusion ½ x ¼ with swelling 3 x 3 on outer side of left fore-arm middle part

9 Abrasion ¼ x ¼ on back of leftship middle part

10 Contusion 2" x 1" on outer side of left leg upper part

11 Abrasion 1" x 1" on front of left leg middle part

12 Abrasion ½ x ½" on front of right leg lower part

13 Abrasion ½" x 1/8" on right side of right toe lower part

3 Postmortem examination on the dead-body of Chaman Singh was conducted by Dr P D Gupta Medical Officer, Civil Hospital, Bijnor on 9-7-1974 at 9 a m in the District Mortuary and he found the following ante-mortem injuries on his body

1 Lacerated wound 1" x ½" bone deep on the top of the head

2 Swelling 3" x 2½" on the left parietal area 4 above the left ear

3 Swelling on whole of the occipital area of skull

4 Abrasion 3" x 2½" on the posterior aspect of the left forearm in its middle third

5 Contusion 2" x 1 on the back of the left hand

6 Abrasion ¾" x ¼" on the back of the right elbow joint

7 Contusion 3 x 1″ on the posterior aspect of the right fore-arm

8 Swelling of whole of the right hand

9 Contusion on whole of the lower half of the back of the right side

10 Contusion of whole of the right buttock

11 Abrasion 3″ x 2½″ on the inner aspect of the right leg just below the right knee joint

12 Abrasion 6″ x 4″ on the front of the right leg extending up to its inner side in its lower half

13 Contusion 6 x 2″ on the inner aspect of the left knee joint and lower one fourth of the left thigh

14 Abrasion 1″ x ½ on the inner aspect of the right knee joint at its lower border

15 Abrasion ½″ x ½″ on the middle of the left leg on its inner aspect

3A After completion of the investigation charge-sheet was submitted and at the trial the accused pleaded not guilty To prove its case the prosecution examined in all four witnesses, of whom P W 1 Jasram is the son of the deceased, he had also received injuries and has lodged the FIR P W 3 Ram Singh is the other eye witness of the occurrence and both of them fully corroborated the prosecution case stated above P W 2 Head Constable Hem Singh proved the FIR (Ex Ka-1) prepared by him at the dictation of Jasram and registration of the case and other documents P W 4, S I D P Saxena the Investigating Officer proved the other necessary papers Genuineness of the injury report of Jasram as well as postmortem report was admitted by the accused hence those Doctors were not examined On the other hand, the version of the defence as contained in the telegram (Ex Kha-7) sent on the same day at 9-40 p m to the Superintendent of Police, Bijnor has been that Churdi S/o S Chaman Singh was plucking mango from his grove whereupon Buddhu Singh had reprimanded and slapped him in the morning Immediately thereafter at about 8-30 a m when Buddhu Singh along with other accused ploughing the field Jasram and Hoshram along with their father Chaman Singh and Chander S/o Natthu of whom Chander and Hoshram armed with Tabals, Jasram and Chaman Singh armed with Lathis arrived there and accosting 'Kaise Sale Ne Hamare Ladke Ko Mara Hai, Inhen Jaan Se Maar Do attacked them with their weapons and at that time Ram Nath who had come with food also tried to intervene He was also attacked with Tabal and Lathi and on hearing their alarm Kripal Singh Ase and Lambe also arrived that Budhu and his sons also wielded Lathi in self-defence that they had also received injuries According to Charan Pal he has been falsely implicated because of an earlier dispute with Chaman Singh regarding a passage and on that account a Mar Peet had taken place and Panchayat had decided it and since then the complainant had enmity with him He also alleged that on 14-4-1973 Chandrapal S/o Natthu and his wife had also beaten him about which report (Ex Kha-6) was lodged at P S Kotwali Bijnor and he got his injuries examined Ex Kha-5 is the original injury report prepared by Dr P D Gupta

4 In support of defence accused examined six witnesses of whom D W 1 Dr S C Agarwal proved the injuries of Raghunath Singh Ram Nath Singh and Buddhu Singh Raghunath Singh Ram Nath and Buddhu Singh were examined on 10-7-74 in between 9-30 p m to 10-15 p m

Injuries of Raghunath vide injury report (Ex Kha-1)

1 Contusion ½″ x ¼ (oblique) diffuse swelling 1 x ½″ on the left side of the forehead about 1″ above the left eyebrow along the hair line

2 Scabbed abrasion ½ x ¼″ on the top of the centre of the nose

3 Scabbed abrasion (horizontal) ½″ x ¼″ on the middle of the front aspect of the chest about 2″ above the lower end of the sternum

4 Scabbed abrasion (vertical) 1" x ½" on the upper part of the left shoulder blade

5 Scabbed abrasion 1" x ½" (vertical) diffuse swelling around 3" x 2" on the dorsum of the hand on the outer side about 1" above the root of the index finger

Injuries of Buddhu Singh — vide injury report (Ex Kha-2)

1 Scabbed abrasion (oblique) 2" x ¼" on the lower part of the back aspect of the left fore-arm

2 Oblique contusion 3" x ½" on the upper part of the right shoulder blade

Injuries of Ram Nath Singh — vide injury report (Ex Kha-3)

1 Incised wound (oblique) 1" x ½" x skin on the inner side of the dorsum of the middle of the left hand Pus present

2 Scabbed abrasion (oblique) 2" x 1/8" on the right side of the upper part of the right shoulder-blade

5 In the opinion of Dr Agarwal all the injuries were two and half days old and could be caused on 8-7-1974 at about 8-30 a m

6 D W 2 Sukhbir Singh proved about the dispute with Chaman Singh and about the Panchayat which took place subsequently and Panchnama (Ex Kha-4) D W 3 Dr P D Gupta proved the injury report dated 14-4-1973 of Dharampal (Ex Kha-5) according to which he had received one lacerated wound and three abrasions D W 4 Court Muharrir Prem Pal Singh proved the FIR (Ex Kha-6) dated 14-4-1973 D W 5 Nishpal Singh proved the copy of the telegram (Ex Kha-6) He had brought the record from the Telegraph Office Lastly, Ram Nath accused examined himself on oath as D W 6 and supported the version as given in the telegram

7 Learned Sessions Judge, however, believed the prosecution evidence and disbelieved that of the defence holding that the injuries on the persons of the accused could be fictitious or self-inflicted, hence he convicted and sentenced the appellants as stated above, but gave benefit of doubt to Dharampal Singh and acquitted him

8 We have heard the learned D G A and Sri P N Misra learned counsel for the convict appellants and Dharampal Singh On behalf of the convicts it was argued that the Mar-peet no doubt had taken place on 8-7-74 at about 8/8-30 a m in between the parties in which Chaman Singh deceased and Jasram had received injuries According to the defence version on the side of the convicts all the three, namely, Buddhu Singh, Ram Nath and Raghunath Singh had received injuries At that occurrence presence of their injuries has been concealed by the prosecution The same was neither mentioned in the FIR nor in the statement u/S 161, Cr P C nor in the evidence produced before the Court below that according to the prosecution the occurrence had taken place in the field of Chaman Singh while according to them the occurrence had taken place in their field that there was no clinching proof like that recovery of blood from either of the two places and thus the prosecution failed to prove that the occurrence had taken place in the field of Chaman Singh It was further pointed out that on the evidence on record the origin of the fight was shrouded in mystery and that even if the defence version was not proved unless the prosecution proved its case to the hilt, their conviction was liable to be quashed and the Government appeal in any case was liable to be dismissed In his judgment the learned Sessions Judge has disbelieved the defence version that all the three accused namely, Buddhu Singh Ram Nath and Raghunath had also received injuries at that time In his view the defence version was not probable as on the side of the complainant there were large number of injuries than on the side of the accused and only two persons were injured while two escaped completely unhurt on the side of the accused He further found the examination of the injuries on 10-7-74 after two and a half days suspicious and the explanation given for the delay as unsatisfactory In his view it appeared that the accused could not get a Doctor who could

give a report according to their desire, hence they got themselves examined on 10-7-74 when they could get such a Doctor He has also observed that the injuries could be self-inflicted also, as admitted by Dr S C Agarwal (D W 1) He, therefore, totally rejected the defence version and has further observed that even the telegram was sent late after obtaining legal advice to make out a case of self-defence

9 On behalf of the accused-appellants it was argued that they could not do better than to produce the Doctor, Sri S C Agarwal (D W 1), the Medical Officer of the Government District Hospital, who had examined their injuries It was further argued that it was immaterial whether the injuries were got examined on 10th July, 1974 after two and a half days and if the same had been examined on 8th July, 1974, itself, even then the nature of the injuries would have remained the same Hence unless it is believed or held that Dr S C Agarwal had perjured, there is no reason to disbelieve his testimony that he had examined the injuries as noted in the injury reports (Exs Kha-1 to Kha-3), that the duration of the injuries as given in the injury report and deposed by Dr Agarwal clearly indicate that the same had taken place on 8th July, 1974 in the morning at about 8-30 a m

9A While examining the papers on record we have come across the order dated 23-7-74 of Sri H N Singh, the then learned Sessions Judge, Bijnor On behalf of the three appellants it was alleged that they themselves had received injuries at the hands of the deceased and they had acted in self-defence The application was supported with telegram and the injury reports The learned Sessions Judge has specifically stated in the order that he got the three appellants summoned from jail and verified their injuries as noted in their injury reports physically one by one on their persons The scars of all those injuries were present on their person He, therefore, found it a fit case for bail

10 We have referred to the above contents of the order with a view to appreciate the defence evidence whether the injuries noted on the person were wholly fictitious as alleged on behalf of the prosecution We are conscious of the fact that this order was not tendered in evidence at the trial However, it is a judicial order and its contents can be noted The genuineness of the order was neither/nor could be doubted In that view of the contents of the order we have no doubt that the accused appellants had received injuries We have, therefore, no reason to doubt that they had got their injuries examined on 10th July, 1974, through Dr S C Agarwal who noted the injuries on their person as contained in Exs Kha-1, Kha-2 and Kha-3 There can be no reason to doubt that the observation of the learned Sessions Judge could be false Hence once it is believed that the accused appellants had received injuries on 8th July 1974 at about 8/8-20 a m it is for the prosecution to explain their presence On behalf of the State learned D G A has referred to a recent decision of the Hon'ble Supreme Court in the case of Vijayee Singh v State of U P AIR 1990 SC 1459 (1990 Cri LJ 1510) In support of his contention it was not necessary for the prosecution to have explained the injuries of the accused

11 In the case before the Supreme Court a rioting had taken place at about 8 a m and in the course of that rioting two persons were killed and two persons had received injuries In respect of those offences fourteen accused were tried u/Ss 148 and 302 read with S 149, IPC and some were tried for the offence u/S 307, IPC In that occurrence two of the accused had also received injuries There was gun-shot injuries on one of the accused and on other accused there was lacerated wound The Doctor however, admitted that the gun-shot injuries were five tiny abrasions in the area of 4" x 4" on outer surface of right thigh On X-ray Report ten radio opaque shadows were found Those pellets remained embedded in the thigh On behalf of the defence plea of private defence was also taken The plea regarding non-explanation of injuries of the prosecution witnesses was rejected as the evidence of the material witnesses even otherwise was found to be cogent, convincing

and acceptable as two of the witnesses were also injured As regards the evidence of acting in self-defence it was held that the accused had proved infliction of injuries on them by the complainant party in the course of the occurrence and therefore, their plea appeared to be reasonably true and consequently they were entitled to the right of the self-defence The next question arose whether they had exceeded that right On behalf of the appellants it was urged that it could not be said with certainty that the appellants had exceeded the right and therefore, they were entitled to acquittal Their Lordships observed and held as follows

"In Amjad Khan v The State, 1952 SCR 567 AIR 1952 SC 165 (1952 Cri LJ 848) on the facts and circumstances of the case it was held that the accused was entitled to a right of private defence of the body even to the extent of causing death as there was no time to have recourse to the authorities and had reasonable grounds for apprehending that either death or grievous hurt would be caused either to himself or to his family These things could not be weighed in too fine a set of scales or "in golden scales In Puran Singh v State of Punjab AIR 1975 SC 1674 (1975 Cri LJ 1479) it is observed that the right of private defence of property or person where there is real apprehension that the aggressor might cause death or grievous hurt to the victim could extend to the causing of death also and it is not necessary that death or grievous hurt should actually be caused before the right could be exercised A mere reasonable apprehension is enough to put the right of private defence into operation It is also observed that the question whether a person having a right of private defence has used more force than is necessary would depend on the facts and circumstances of a particular case

In the case before us as per the evidence of the material witnesses the two deceased were only proceeding along with the rasta towards the pump set for taking bath Even on the plea set up by Chirkut Singh, accused No 6, it is not stated specifically that deceased Nos 1 and 2 were armed with any deadly weapons Therefore the assailants had definitely exceeded the right of private defence when they went to the extent of intentionally shooting them to death by inflicting bullet injuries Therefore the offence committed by them would be one punishable u/S 304, Part 1 IPC "

12 From the above it is clear that their Lordships in the above referred case of Vijayee Singh (Supra) held that the assailants had exceeded the right of private defence not only because they had intentionally indulged in intentional shooting and causing death by bullet injuries but the deceased were also unarmed and were just going along with their Rasta towards pumping set for taking bath, that is, there could not be any apprehension of receiving any injury from those persons to the accused

13 In the present case however all the present three appellants had received injuries and one of them had also received incised wound, while the deceased as well as the injured witness Jasram (P W 1) were caused injuries by the appellants with Lathi or Dandas, i e , on the side of the complainant there was even use of some sharp edged weapon along with Lathi while on the side of the accused appellants they had used Lathi only and therefore it cannot be said that the present appellants had at all exceeded their right of self-defence

14 We accordingly set aside the conviction and sentences of the appellants Ram Nath, Raghunath Singh and Buddhu Singh u/Ss 304 and 323 both read with S 34, IPC They are already on bail They need not surrender Their bail bonds are cancelled and sureties discharged

15 Govt Criminal Appeal No 1634 of 1978 accordingly has no force and is hereby dismissed

Order accordingly

1991 ALL L J 701

= 1991 Cri L J 1888

D P S CHAUHAN, J

Naresh Chand Jain Petitioner v State of U P and others Respondents

Cri Misc Application No 453 of 1982 D/-16-11-1990

Penal Code (45 of 1860), S 500 — Criminal P C (2 of 1974), Ss 468(2), 482 — Defamation — Prosecution for — Bar of Limitation — Starting point is date on which defamatory statements are published — Complaint not containing date of publication of defamatory statements — No offence of defamation made out — Case pending since last 8 years — Complainant not interested in explaining delay — Proceedings liable to be quashed u/S 482, Cr P C (Paras 7, 8)

Cases Referred Chronological	**Paras**
1982 Cri LJ 1717	4
1981 Cri LJ 722 AIR 1981 SC 1054	3
1963 (1) Cri LJ 797 AIR 1963 SC 765	4
1951 (52) Cri LJ 775 AIR 1951 SC 207	4
AIR 1943 Pat 245 209 IC 482	4
1910 ILR (37) Cal 412	4

Sri L P Naithani Advocate for Petitioner A G A , for Respondents

ORDER — By means of the present petition u/S 482, Cr P C , 1973 (hereinafter for brevity, referred to as Cr P C), the petitioner has sought the relief for quashing of the complaint in case No 172 of 1980, Sheo Kumar v Naresh Chand Jain u/S 500 of the Penal Code (hereinafter, for brevity, referred to as I P C) pending in the court of Judicial Magistrate Kathras, District Aligarh

2 The background leading to the filing of the complaint, in question, is the acquittal of Sri Sheo Kumar in case No 2034 of 1974 from the charge u/S 406, IPC by the Judicial Magistrate Meerut under its order dated 14-7-1980 It was on the basis of the FIR dated 15-5-1977 lodged by the petitioner at Police Station Civil Lines Meerut against Sheo Kumar the driver of the petitioner s Mini Bus No UTG-837 plying on the City Railway Station to Medical College route on the basis of the permit, who took away the said Bus on the pretext of getting it repaired but did not bring back the same; the criminal case on the submission of the chargesheet by police against Sheo Kumar started

3 The complainant, who is respondent in the present case has neither put in appearance nor has he filed any counter affidavit His passive attitude reflects that he is not interested in the matter I have heard learned counsel for the petitioner Sri L P Naithani, Senior Advocate and also the Addl Public Prosecutor, who in fact is not interested in the matter

4 Learned counsel for the petitioner has come forward with the case that as per statement contained in para 3 of the complaint, the allegations in the FIR which are said to have been made falsely for defaming the complainant s reputation constitute the real basis of the complaint and the same is the cause of action He has further stated that the complaint did not disclose the starting point of limitation and also did not disclose the fact of publication of the alleged defamatory statements in the FIR, so to constitute the offence of defamation. On this basis he contends that the Magistrate, who took the cognizance of the offence u/S 500, IPC on the basis of the complaint on 1-8-1980, did not apply his mind on the question of limitation as the complaint was ex facie beyond the period of limitation provided u/S 468 Cr P C Further, he did not apply his mind in looking into the allegations of fact contained in the complaint as to when the alleged defamatory statements were published so to constitute the offence of defamation The entire proceedings are thus without jurisdiction

5 Section 468, Cr P C provides for limitation for launching the criminal prosecution, which is quoted hereunder

AI/DI/A85/91/BNG/VVG

468 Bar to taking cognizance after lapse of the period of limitation —

(1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-sec (2), after the expiry of the period of limitation

(2) The period of limitation shall be —

(a) six months, if the offence is punishable with fine only,

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year,

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years

(3) For the purposes of this section, the period of limitation in relation to offence which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be the most severe punishment '

This provision is a newly introduced provision and as the Supreme Court has said in a case State of Punjab v Sarvan Singh reported in AIR 1981 SC 1054 1981 Cri LJ 722, that the object for putting a bar of limitation for prosecution under it is clearly to prevent the parties from filing cases after a long lapse of time, as a result of which material evidence may disappear and also to prevent the abuse of the process of the court by filing vexatious and belated prosecutions long after the date of offence The object which the Statute seems to observe is clearly in consonance with the cardinal principles of fairness of trial as enshrined in Art 21 of the Constitution of India. It is, therefore, of the utmost importance that any prosecution whether by the State or a private complainant must abide by the letters of law or to take the risk of prosecution failing on the ground of limitation

6 The offence u/S 500, IPC which attracts the punishment for imprisonment for a term of two years is undisputedly covered under cl (c) of sub-s (2) of S 468, Cr P C Under cl (1) what is prohibited is taking of cognizance of an offence The word cognizance' is not defined in the Code but S 190, Cr P C provides that the Magistrate may take cognizance of an offence upon receiving complaint of facts which constitute such offence, or upon a police report of such fact, or upon information received from any person other than the police officer, or upon his own knowledge that such offence has been committed It contemplates that the fact must be such so as to disclose the offence The cognizance of an offence can be taken on a complaint in writing or orally in view of the definition of complaint given in sub-cl (d) of S 2 Cr P C The word 'taking of the cognizance in S 190, Cr P C has no reference to any formal action The word cognizance came up for consideration before the Supreme Court in case of Ajit Kumar v State of West Bengal, reported in AIR 1963 SC 765 1963 (1) Cri LJ 797 and the Supreme Court has said (at page SC 770 of AIR 1963)

'The word 'cognizance' has no esoteric or mystic significance in criminal law or procedure It merely means — become aware of and when used with reference to a Court or Judge, to take notice of judicially It was stated in Gopal Marwari v Emperor, AIR 1943 Pat 245 (SB) by the learned Judges of the Patna High Court in a passage quoted with approval by this Court in R R Chari v State of U P 1951 SCR 312 at p 320, AIR 1951 SC 207 at p 210 (1951 (52) Cri LJ 775), that the word cognizance was used in the Code to indicate the point when the Magistrate or Judge takes judicial notice of an offence and that it was a word of indefinite import, and is not perhaps always used in exactly the same sense As observed in Emperor v Sourindra Mohan ILR 37 Cal 412 at p 416 'taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence ' Where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken obviously the statutory requirement must be fulfilled "

So the terminus point for the purpose of limitation is taking of the cognizance by the Magistrate of the offence For the purpose of limitation, starting point is to be seen and the starting point in case like present one could be the date on which the defamatory statements contained in the FIR are published Learned counsel for the petitioner has placed reliance on the case of Punjab and Haryana High Court in Ghanshyam Dass v Shyam Sunder Lal reported in 1982 Cri LJ 1717 This case is not attracted as in this case the first information report containing defamatory statements was lodged on 20-5-75 and the report was submitted on 13-7-1977 and the trial ended in acquittal on 11-2-1980 It was undisputed that the complaint filed was beyond limitation from the date of the first information report containing the defamatory statements and also from the date of submission of chargesheet and no explanation was given in the complaint The question, as to whether the date of the FIR can be the date on which the limitation for filing the complaint starts, has not been decided in the said case However, in the present case the date of lodging of FIR containing statements alleged to be defamatory was lodged on 12-5-1977 and from this date the complaint is beyond limitation but the limitation would not be counted from this date in view of exception (9) of S 468, Cr P C The date of filing of chargesheet is not disclosed in the complaint and in the absence of the material before this court, it would not be fair to record finding either way

7 It is clear that the Magistrate before taking of the cognizance did not satisfy himself about the bar of limitation as imposed by S 468, Cr P C as the complaint did not contain the date when the chargesheet was filed in the court, or when the alleged defamatory statements contained in the FIR were published So it is clear that the Magistrate while taking of the cognizance of the offence u/S 500, IPC failed to apply his mind to the question of limitation Apart from it, since the complaint did not contain the date as to when the defamatory statements contained in the FIR were published, there could be no offence of defamation unless the statements are published The Magistrate failed to consider this aspect of the matter also while taking cognizance of the offence on the basis of the complaint

8 The power u/S 482, Cr P C is to be exercised ex debito justitiae to do the real and substantial justice for administration of which alone courts exist It would not be proper after pendency of the case in this court for about 8 years to send back the matter for explanation of delay Explanable u/S 473 Cr P C Apart from it, the conduct of the complainant shows negligence and he has not been interested in the matter It would be in consonance with the object of the provision of S 482, Cr P C and also in the interest of justice that the proceedings in question, which remained pending in this court for about 8 years, be not allowed to continue any further

The petition is accordingly allowed The complaint in case No 172 of 1980 Sheo Kumar v Naresh Chand Jain pending in the court of Judicial Magistrate, Hathras is hereby quashed The interim stay order dated 27-1-1982 passed by this court is discharged

Petition allowed

1991 ALL L J 703

V K KHANNA AND
R A SHARMA, JJ

Dr Smt Sandeepa Shrivastava, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn No 18419 of 1989, D/-22-12-1989

U P State Universities Act (Presi Act 10 of 1973), S 28 — U P Government Order dt 15-12-1982 — Admission to First Year Residency Course in M D (Gynaecology) — It is not restricted to candidates of 1983 M B B S batch — Candidate of earlier batch can also be admitted — Training of house job abolished — Resolution that candidates undergoing house job training be admitted to 1st year of Junior Residency — It is fair and reasonable

Education — Admission to P G Medical Courses

Constitution of India, Art 226

(Paras 6, 7, 8)

Petitioner in Person, Standing Counsel, for Respondents

R A SHARMA, J — Dr Smt Sandeepa Shrivastava has filed this writ petition for a writ of mandamus directing the respondents not to admit Dr Surabhi Rai respondent No 3 in the First Year Residency Course in M.D Gynaecology and further to admit the petitioner in the aforesaid course

2. The petitioner was selected in the Pre-Medical Test in the year 1983 and has completed the M B B S course in 1988 She has also completed one year course of internship in June 1989 Moti Lal Nehru Medical College, Allahabad (hereinafter referred to as the Medical College) invited applications for House Job and in pursuance thereof the petitioner applied for the same However before the admission in the course of House Job could be completed, Government of U P issued a Notification dated 22-8-1989 introducing thereby three years course of post graduation The earlier period of one year house job was abolished and Junior Residency Course as well as Senior Residency Course were introduced First year of the Junior Residency Course was made equivalent to first year of House Officer

3 Dr Surabhi Rai, the respondent No 3 has passed M B B S Course in 1987 and has also completed the one year internship She has joined one year House Job and has completed about seven months course of House Job As the course of house job has been abolished by virtue of the Government Order dated 22-8-1989, a new course of Junior Residency and Senior Residency have been introduced, with the result that Dr Surabhi Rai can no more persue the course of house job As the course of house job has been abolished, the Principal of the Medical College summoned all the applications of the house job and treated them as the applications for First Year Residency Course These applications included that of the petitioner and respondent No 3 Dr Surabhi Rai

4 The selection for the First Year Residency Course was to be made on merit in accordance with clause 2 of the Government Order dated 15-12-1982, issued under Sec 28 of the U P State Universities Act, 1973 By this order the Government has laid down principles for determining the merit for the purpose of admission Clause 2 of this Order is quoted below

"(2) The basis of determining the merit shall be percentage of marks worked out after deducting one percent marks for each failure in every subject from the total percentage of marks obtained in the M B B S Examination In case a candidate who fails in a subject and is declared successful in second or subsequent attempt in that subject the marks obtained by him or day to day performance in the first examination in that subject shall be added to his total marks while preparing the said index

The college authorities prepared the merit index in which Dr Surabhi Rai was placed at serial No 14 with 61 33% marks and the petitioner Dr Smt Sandeepa Shrivastava has been placed at serial No 15 with 61 25% marks With the above merit index neither Dr Surabhi Rai nor the petitioner Dr Smt Sandeepa Shrivastava was admitted Dr Surabhi Rai, as such filed writ petition No 17028 of 1989, Dr Surabhi Rai v State of U P and others for writ of mandamus for her admission in the First Year Junior Residency Course in the subject Obstetrics and Gynaecology Dr Smt Sandeepa Shrivastava has filed this writ petition with a prayer that Dr Surabhi Rai be not admitted in the Junior Residency Course and instead the petitioner be admitted We have heard both the writ petitions together and the writ petition of Dr Surabhi Rai has been decided by a separate judgment today

5 In support of her writ petition, the following points have been argued before us

(i) Candidates of 1983 batch who have passed M B B S Course in 1988 are entitled to be admitted in the First Year of Junior Residency Course and Dr Surabhi Rai respondent No 3 being a candidate of 1981-82 batch and having passed the M B B S course in 1987 is not eligible for being admitted in the said course, and (ii) Those candidates, who are undergoing training of one year house job cannot join the First Year of Junior Residency Course and they will be entitled to join the Second Year of the Residency Course after completing the one year house job

6 We have perused the Government Order dated 22-8-1989 which has been filed as Annexure I to the writ petition and we do not find any such condition in this Order so as to confine the admission in the First Year Junior Residency Course to the candidate of 1983 batch From the perusal of this order it is clear that any one, who satisfied the requirements, is entitled to be admitted in this Course Learned counsel for the petitioner has in this connection invited our attention to clause 4 of the resolution dated 16-9-1989 of the Principals of all the Medical Colleges of U P and the Director of Medical Education and Training By this clause of the resolution, it has been mentioned that doctors of 1983 M B B S batch are undergoing one year internship and if the selection for admission in the First Year of Junior Residency Course is held now this will disturb the students of this batch and as such in view of that difficulty it was decided that admission in the First Year of Junior Residency Course be made only after the completion of one year internship of 1983 batch of M B B S By this clause, it was nowhere laid down that admission to First Year Junior Residency Course is to be confined to 1983 M B B S batch only The first contention of the petitioner lacks merit and cannot be accepted

7 The second contention of the petitioner has also no force For this proposition, the petitioner has relied on the last part of para 5 of the Government Order dated 22-8-1989 Para 5 of the Government Order has laid down that house officers and junior doctors working since August 1, 1987 will be converted into Junior Residents of First Year Second Year etc, in accordance with the chart given in this para Last part of this para lays down about these house officers, who were working since 1-8 1987 This para does not provide for the criteria or deal with the admission of those candidates who have joined the first year house job and have not yet completed even first year The cases of those, who have joined the course of house job but could not complete till the introduction of the new scheme of the residency, has been considered in the meeting of the Principals of all the Medical Colleges of U P and Director of Medical Education and Training on 16-9-1989 Para 6 of this resolution laid down that as the course of house job has been abolished after the enforcement of the residency scheme and the candidates, who are undergoing training of house job cannot persue their studies and training any more and as such, all those candidates who are undergoing training of house job should be admitted in the first year course of Junior Residency on the basis of merit This resolution of the Principals of all the Medical Colleges appears to be fair and most reasonable As the course of house job has been abolished and the candidates undergoing this course cannot possibly persue their studies and if they are not admitted in the first year of the Junior Residency, they will suffer great hardship and irreparable loss because they have been deprived of their right to persue their course of house job in the middle of the session

8 When the course of house job has been abolished, it is impossible for the persons undergoing the course of house job to persue their studies any more In fact respondent No 3 would have been happy, if she was permitted to continue and conclude the one year course of house job, because in that case after few months she would have got admission in the second year of Junior Residency and would have become senior to the petitioner and all others, who will be joining the first year of Junior Residency course now, but on account of the abolition of the system of

house job it became impossible for the respondent No 3 to continue with the course and as such she had to be contended with the admission in the first year of Junior Residency course

9 For the reasons given above, the writ petition has no merit and is dismissed In view of the facts and circumstances of the case, there will be no order as to costs

Petition dismissed

1991 ALL L J 706

(SUPREME COURT)

(From Allahabad)

LALIT MOHAN SHARMA AND
M M PUNCHHI JJ

Civil Appeal No 2272 of 1991 (arising out of S L P (C) No 16526/90) D/-6-5-1991

M/s Poddar Steel Corporation Appellant v M/s Ganesh Engineering Works and others, Respondents

Constitution of India, Arts 299, 14 — Govt contract — Auction sale — Conditions in auction notice — Not that every term must be literally complied — Term that earnest money be deposited by cash or by demand draft drawn on State Bank — Highest tenderer depositing earnest money by certified cheque of Union Bank — Technical irregularity — Literal compliance of term can be waived and Tender accepted

Decision of Allahabad High Court, Reversed

An authority inviting tenders it cannot be said is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the conditions In the first case the authority issuing the tender may be required to enforce them rigidly In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases Thus although the earnest money under the terms of tender notice was permitted to be deposited only by cash or by demand draft drawn on the State Bank of India the payment of earnest money by certified cheque of the Union Bank of India drawn on its own Branch could be treated as sufficient compliance of the term It could not be said that the authority inviting the tenders could not waive the literal compliance of such a condition and accept the tender specially when it was in its interest not to reject the bid which was the highest

Decision of Allahabad High Court, Reversed (Paras 6, 8)

Cases Referred Chronological	Paras
AIR 1990 SC 958 : (1990) 2 SCC 488	6
AIR 1984 Bombay 351	5, 7
AIR 1982 Kerala 81	5, 7
AIR 1979 SC 1628 : (1979) 3 SCC 489	6
AIR 1965 SC 1628 : 35 Com Cas 526	7
(1873) LR 8 Ch App 407 : 42 LJ Ch 488 : 28 LT 153 Spargo's case	7

SHARMA, J — Special leave is granted

2 In response to a notice inviting tenders by the Diesel Locomotive Works Indian Railways in connection with disposal of one lot of Ferrous Scrap, a number of tenders were submitted by the appellant the respondent No 1 and other intending purchasers The tenders of the respondent No 1 and some other bidders were rejected as defective and the appellant's offer being the highest was accepted, and accordingly the appellant deposited a sum of about Rs 15 lacs The respondent No 1 challenged the decision by a writ petition before the Allahabad High Court contending that there was no defect in its tender and that the tender of the appellant could not have been validly accepted as the necessary condition of payment of Rupees 50,000/- as earnest money with the tender had not been complied with The application

EI/FI/S324/91/VVG

was resisted on the grounds (i) that the respondent No 1 having not deposited the earnest money at all was not entitled to a consideration of its tender and has no locus standi in the present matter and (ii) that the appellant had substantially complied with the requirement by sending with its tender a Banker s Cheque marked and certified by the Union Bank of India as good for payment The High Court accepted the appellant s first ground holding that the tender of the respondent had been rightly rejected for failure to deposit the earnest money, but allowed the writ petition on the finding that the appellant also did not satisfy the condition No 6 of the tender notice as the earnest money was offered by the Banker s Cheque of a bank other than the State Bank of India mentioned in the said clause The High Court directed the authorities to consider the other valid tenders and further observed that should the other tenders be found to be unacceptable it would be open to the authorities to invite fresh tenders The present appeal is directed against this judgment

3 The case of the appellant has been that its tender mentioned the highest amount of one and a half crores rupees for the 2000 M T of Ferrous Scrap which was a very fair price and the authorities were absolutely right in accepting the same With respect to the alleged deficiency in the matter of deposit of the earnest amount the stand is that a Banker s Cheque is as good as cash and especially so when a verification from the bank in question about its authenticity was made and the bank s assurance to honour the same was obtained Admittedly the Tender Committee had taken the precaution of getting the matter confirmed from the appellant s bank before deciding to accept his tender

4 The relevant clause 6 of the notice required the tender to be accompanied by earnest money calculated at 5% of the offer under the tender subject to a maximum of Rs 50,000/- and in terms permitted the deposit by cash or by demand draft drawn on the State Bank of India The defect pointed out by the respondent No 1 and accepted by the High Court is in the appellant sending the cheque of the Union Bank of India drawn on its own branch and not on the State Bank By the impugned judgment it has been held that in view of this defect the authorities had no power to accept the appellant s tender

5 The learned counsel for the appellant has contended that having regard to the circumstances in the case it must be held that the Tender Committee had the power to accept the appellant s tender Referring to the books Bills of Exchange by Byles and 'Cheques in Law and Practice by M S Parthasarathy it has been argued that certified cheques are as good as cash and the irregularity relied upon in the appellant s submitting his tender could be validly waived by the Diesel Locomotive Works Reliance was also placed on M/s B D Yadav and M R Meshram v Administrator of the City of Nagpur AIR 1984 Bombay 351 and T V Subhadra Amma v Kerala Board of Revenue AIR 1982 Kerala 81

6 It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank the clause No 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition In the first case the authority issuing the tender may be required to enforce them rigidly In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases This aspect was examined by this Court in G J

Fernandez v State of Karnataka, (1990) 2 SCC 488 (AIR 1990 SC 958), a case dealing with tenders Although not in an entirely identical situation as the present one, the observations in the judgment support our view The High Court has, in the impugned decision relied upon Ramana Dayaram Shetty v International Airport Authority of India, (1979) 3 SCC 489 (AIR 1979 SC 1628) but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon The authority in that case by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination The judgment indicates that the Court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question This part of the judgment demonstrates the difference between the two categories of the conditions discussed above However it remains to be seen as to which of the two clauses the present case belongs

7 The nature of payment by a certified cheque was considered by this Court in Sita Ram Jhunjhunwala v Bombay Bullion Association Ltd , (1965) 35 Com Cas 526 (AIR 1965 SC 1628) Several objections were taken there in support of the plea that the necessary condition in regard to payment was not satisfied and in that context this Court quoted the observations from the judgment in an English decision (vide Spargo's case (1873) L R 8 Ch App 407) that it is a general rule of law that in every case where a transaction resolves itself into paying money by A to B and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards This court applied the observations to a transaction requiring payment by one to another The High Court's decisions in B D Yadav's case (AIR 1984 Bombay 351) and T V Subhadra Amma's case (AIR 1982 Kerala 81) are also illustrations where literal compliance of every term of the tender notice was not insisted upon

8 In the present case the certified cheque of the Union Bank of India drawn on its own branch must be treated as sufficient for the purpose of achieving the object of the condition and the Tender committee took the abundant caution by a further verification from the bank In this situation it is not correct to hold that the Diesel Locomotive Works had no authority to waive the technical literal compliance of clause 6 specially when it was in its interest of not to reject the said bid which was the highest We therefore set aside the impugned judgment and dismiss the writ petition of the respondent No 1 filed before the High Court The appeal is accordingly allowed with costs throughout

Appeal allowed

1991 ALL L J 708

(SUPREME COURT)

(From Allahabad)

K N SINGH AND
P B SAWANT JJ

Civil Appeal No 1244 of 1985 D/-1-5-1991

Daya Chand and others Appellants v Om Dutta Sharma and others Respondents

U P Zamindari Abolition and Land Reforms Act (1950), S 229B — Suit for title — Maintainability — Land alleged to be received by way of gift — Dispute regarding adjudicated in consolidation proceedings — Gift deed found to be invalid — Affirmed by High Court —Subsequent suit by same party for declaration of title under S 229B alleging that gift deed was valid — Barred by S 49 of Consolidation Act

Decision of H C , D/-25-1-1985, Reversed

U P Consolidation of Holdings Act (1953), S 49 (Paras 4, 5)

EL/FL/S340/91/VNP

JUDGMENT — This appeal is directed against the judgment and order of a learned single Judge of the High Court of Allahabad dated January 25 1985 setting aside the judgment and order of the Board of Revenue in dismissing the respondents suit filed under S 229-B of the U P Zamindari Abolition and Land Reforms Act, 1950 and upholding the order of the trial Court decreeing the suit

2 The respondents filed a suit under S 229-B of the U P Zamindari Abolition and Land Reforms Act 1950 for declaration of Bhumidhari and Sirdari Rights in respect of the land in dispute which according to them had been gifted to them by Smt Phoolu in 1963 The appellants who were defendants contested the suit contending that the gift deed was invalid and the defendants were entitled to the land as they were legal heirs of Smt Phoolu The defendants further contended that the suit was barred by S 49 of the U P Consolidation of Holdings Act as the dispute between parties relating to the land had already been adjudicated by consolidation authorities and in those proceedings gift deed had been found to be invalid The respondent s claim had been rejected by all the consolidation authorities and their orders were affirmed by the High Court by its order dated 9-8-1966 in W P No 2581 66 filed by Om Dutta respondent

3 The trial Court decreed the plaintiff's suit but on an appeal the Addl Commissioner set aside the order of the trial Court and dismissed the suit on the finding that the gift deed was invalid On second appeal preferred by the respondent the Board of Revenue that held the respondent suit was barred by S 49 of the U P Consolidation of Holdings Act 1953 and the gift deed was invalid The respondents challenged the order of the Revenue Courts before the High Court under Art 226 of the Constitution a learned single Judge of the High Court allowed the writ petition by the impugned orders dated 9-8-1966 and set aside the orders of the Addl Commissioner and the Board of Revenue and restored the order of the trial Court on the finding that the suit was not barred under S 49 of the U P Consolidation of Holdings Act and the gift deed executed by Smt Phoolu in favour of Om Dutta the plaintiff-respondent was valid

4 After hearing learned counsel for the parties and having considered the material on record we are of the opinion that this appeal must succeed There is no dispute that the question relating to the title to the land in dispute had been raised and adjudicated by the authorities in proceedings under the Consolidation of Holdings Act, 1953 Parties produced their evidence and the matter was examined at various level and all the authorities under the Act held that the gift deed was invalid as no prior permission had been obtained for the transfer of the land from the settlement officer as required by S 5 of the Act This view was affirmed by the High Court in the writ petition filed by Om Dutta himself, therefore, validity of the gift deed could not be reconsidered in subsequent suit The learned Judge of the High Court committed error in holding that the dispute before the Consolidation authorities was with regard to mutation and not for title to the land The learned Judge further erred in holding that the gift deed was valid ignoring the earlier binding decision of the Division Bench of the High Court holding the gift deed invalid as that order had become final between the parties

5 Since the claim of the parties to the land in dispute had been adjudicated by the Consolidation authorities and the gift deed relied upon by the Om Dutta respondent was held to be invalid and since those findings of the Consolidation authorities were affirmed by the High Court in 1966 thereafter no suit could legally be maintained by Om Dutta for declaration of his title to the land in dispute S 49 of the Act clearly barred such a suit The Board of Revenue rightly held that the respondent suit was not maintainable The High Court wrongly interfered with the findings of the Board of Revenue We, therefore allow the appeal set aside the order of the learned single Judge of the High Court and dismiss the suit filed by the respondents u/S 229-B of the U P Zamindari Abolition and Land Reforms Act During the pendency of the

appeal the appellants furnished security for mesne profits before the District Judge Since the appellants have succeeded the security furnished by them is discharged Parties shall bear their own costs

Appeal allowed

1991 ALL L J 710

B L YADAV J

Ram Rup Petitioner v Assistant Director of Consolidation Jaunpur and another Respondents

Civil Misc Writ Petn No 5848 of 1991 D/ 1 2 1991

U P Consolidation of Holdings Act (1953), Ss 9, 9 A, 11, 20, 21 — Objections — Application for condonation of delay filed along with objection — Both dismissed — Appeal against order — Maintainable

Limitation Act (1963), S 5

Where only the application under Section 5 of the Limitation Act has been decided and no order has been passed on the objection against such an order no appeal would lie whereas if the objection has also been rejected then certainly the appeal would lie against the order rejecting the objection along with the application under S 5 of the Limitation Act If an objection was accompanied by an application under S 5 of the Limitation Act and the objection and application under S 5 both are dismissed it amounts to an order under Ss 9 9A or 20 and hence an appeal would lie under S 11 or S 21 of the Act

1971 All WR 755 Distinguished

(Paras 7 8)

Cases Referred Chronological	Paras
1981 All LJ 672	3 4 5 6
1971 All WR 755 (Distinguished)	3 6
1967 All LJ 463 1967 All WR 220	5

B N Upadhyay for Petitioner Standing Counsel for Respondents

EI/GI/A554/91/RAM

ORDER — By the present petition under Art 226 of the Constitution of India the order dated 22 1 1991 passed by the Assistant Director of Consolidation in Revision under Section 48 of the U P Consolidation of Holdings Act 1953 (for short the Act) holding the appeal before the Settlement Officer Consolidation to be maintainable against the order passed by the Consolidation Officer dated 5 12 89 rejecting the objection and also the application under Section 5 of the Limitation Act is sought to be quashed by issuing a writ of certiorari

2 An objection under Section 20 of the Act was filed by Ram Raj respondent No 2 along with an application for condonation of delay under Section 5 of the Limitation Act which was rejected by the Consolidation Officer by his order dated 12 9 89 (Annexure 1 to the petition) as there was no justification for condonation of delay and the objections was thus rejected Against that order an appeal was preferred but the same was dismissed as not maintainable Against that order revision was filed which was allowed by the impugned order dated 22 1 1991 holding that the appeal was maintainable

3 Learned counsel for the petitioner urged that as the objection under S 20A of the Act was time barred hence the appeal was not maintainable and in any case the Assistant Director of Consolidation must have condoned the delay under S 5 and thereafter he could have remanded the case The appeal was not maintainable hence the order of remand was manifestly erroneous Reliance was placed on Sahib Singh v Rameshwar 1971 All WR 755 and Ram Autar v Ram Ratan 1981 All LJ 672

4 In Ram Autar v Ram Ratan (supra) a belated objection under S 20 of the Act accompanied by an application to condone the delay was filed The consolidation officer rejected the objection as time barred The petitioner filed an appeal which was allowed and Chaks were modified The respondent preferred a revision, but the Assistant Director of Consolidation held that the Settlement

Officer Consolidation has no jurisdiction to entertain the appeal just against an order rejecting the application under Section 5 of the Limitation Act This court dismissed the writ petition

5 In Samharoo v State of U P 1967 All LJ 463 1967 RD 201 a Division Bench of this court held that where an application under S 5 of the Limitation Act was allowed that would not become an order under Section 9 9A or 10 of the Act hence it was not appealable under S 11 of the Act The reason was that an application under S 5 precedes the objection in case it was allowed, objection can be decided on merits Simply by allowing the application under Section 5 of the Limitation Act no appeal would lie unless the objection itself was either rejected or allowed the conclusion that where an objection has also been dismissed along with the application against that order rejecting the objection the appeal would certainly lie In the case of Ram Autar v Ram Ratan (1981 All LJ 672) (supra) this court declined to issue the writ prayed for as in that case the consolidation officer has rejected the application under S 5 of Limitation Act as no sufficient cause was made out hence the appeal was certainly not maintainable before the Settlement Officer Consolidation and that was the view taken by the Asstt Director of Consolidation which was maintained

6 In Saheb Singh v Rajeshwar (1971 All WR 755) (supra) it was held that where an objection under Section 9A of the U P Consolidation of Holdings Act along with an application under S 5 of the Limitation Act for condonation of delay was dismissed on two grounds (1) that the objection was filed much after expiry of the period of limitation prescribed for filing an objection and (2) also on the ground that there is no merit in the objection such an order would be an order falling within the purview of Section 9A(2) of the U P Consolidation of Holdings Act and that appeal would be maintainable Consequently the cases relied upon by the learned counsel for the petitioner do not help him Similarly in Ram Autar v Ram Ratan (1981 All LJ 672) (supra) it was held that where only application under Section 5 of the Limitation Act was rejected no appeal would be maintainable

7 In view of the aforesaid decision and on the basis of the nature of the order under Section 5 of the Limitation Act it was manifest that where only the application under S 5 has been rejected or only the application under S 5 of the Limitation Act has been decided and no order has been passed on the objection against such an order no appeal would lie whereas if the objection has also been rejected then certainly the appeal would lie against the order rejecting the objection along with the application under S 5 of the Limitation Act

8 The matter can be viewed from another angle The word appeal means judicial examination of the decision by a higher court of the decision of an inferior court Further right of appeal is a vested right Easily this vested right cannot be made to disappear If objection under S 9 9A or 20 of the Act is also rejected after rejecting the application under Section 5 of the Limitation Act it almost becomes a decree and in any case an order which is appealable If an objection was accompanied by an application under Section 5 of the Limitation Act and the objection and application under S 5 both are dismissed It amounts to an order under Section 9 9A or 20 and hence an appeal would certainly lie under S 11 or S 21 of the Act

9 In the present case the appeal was perfectly maintainable as it was against the order rejecting the objection The Assistant Director of Consolidation did not commit any error much less an error apparent on the face of record in allowing the revision and remanding the matter to the Settlement Officer Consolidation to decide the appeal treating it to be maintainable

10 The petition lacks merit and it is dismissed summarily

Petition dismissed

1991 ALL L J 712

R R K TRIVEDI J

Km Vandana Tiwari Petitioner v The Allahabad University Allahabad and others Respondents

Civil Misc Writ Petn No 3092 of 1990 D/ 19 1 1991

Constitution of India, Arts 12, 14, 226 and 41 — U P State Universities Act (10 of 1973), Ss 6, 45(3) and 52 — Admission to M Sc course in Allahabad University — Candidate who has passed two years degree course in B Sc from Kashmir University cannot be denied admission — Denial is violative of Arts 14, 41 of Constitution and provisions of Act

Education — Admission to M Sc Course — Eligibility

The Allahabad University authorities are not justified in creating a class of the students having graduation degree with three years course only eligible for the Post Graduation and closing the doors for those who obtained graduation degree with two years course This classification is arbitrary and violative of Art 14 of the Constitution and since by the attitude adopted the right of education is closed for ever to those who obtained graduation degree in two years the right provided under Art 41 of the Constitution is also violated It is well known that Art 41 in itself cannot be enforced but since the action of the authorities is clearly arbitrary and discriminatory and Art 14 is attracted the right of the petitioner under Art 41 which creates sacred obligation on the State to provide effective provision of right of education is also attracted

(Para 7)

It is well known that M A and M Sc courses are permitted in particular subject only It could be seen by the University authorities as to whether the student seeking admission in M A or M Sc previous had that particular subject while doing B A or B Sc course Such consideration could only be said to be relevant while considering the case of a candidate seeking admission to the Post Graduate course of M A or M Sc The graduation degrees could not be legally distinguished for purposes of admission only on basis of the years prescribed for doing the course There is no material to establish any difference in academic sense For all purposes the graduation degree whether obtained on the basis of two years or three years course is given same value Therefore the petitioner who has obtained B Sc degree of 2 years from Kashmir University is fully entitled to M Sc previous course in Allahabad University

(Para 8)

After having recognised the degree of Kashmir University with two years course for purposes of admission to M Sc previous examination the respondents cannot legally say that the petitioner is not qualified for joining the M Sc previous The qualification for admission to M Sc previous course is B Sc degree The same course could be taught and studied in two years as well as in three years In many Universities the same course is still being taught in two years To create distinction between graduation degrees on basis of years in which its course has been completed is wholly illegal and arbitrary for refusing admission The stand taken by the respondents is contrary to the provisions of Section 45(3) of the Act

(Para 9)

It cannot be disputed that the University is a State within the meaning of Art 12 of the Constitution and its action are subject to Art 14 thereof Any action of the respondents closing the doors of the temple of education in arbitrary and discriminatory manner by creating imaginary classification cannot be permitted which is violative of Art 14 of the Constitution The right of education is a valuable right and it cannot be curtailed unless the candidate seeking admission in the University is not entitled for same for any legal and valid reason

(Para 11)

CI/FI/A342/91/MVJ

Cases Referred	Chronological	Paras
AIR 1987 SC 57		6 11

K R Singh for Petitioner Haider Hussain for Respondents

ORDER — The question involved in the present writ petition is regarding the right of student having completed graduation in two years degree course to get admission for doing Post Graduation in University of Allahabad The present petitioner passed her B Sc final examination from University of Kashmir which is still having two years degree course Father of petitioner is employed as an Army Officer and he was posted in State of Jammu and Kashmir in peace station and so the petitioner could live with her father and complete her graduation from the aforesaid University However father of petitioner was subsequently transferred to field area Consequently he could not keep his family with him and the petitioner was compelled to shift to Allahabad (petitioner s home district) The petitioner s result for the B Sc final examination was declared on 29th May 1989 and then she approached the authorities of the respondent No 1 for seeking admission in Post Graduation course

2 It is relevant to mention here that the Allahabad University adopted three years degree course for granting graduate degree some time back and was granting admission in Post Graduation and LL B courses only to those who possessed three years degree course In order to provide relief to the students having two years course degree a Bridge course was started and the students were allowed admission thereafter for doing Post Graduation The petitioner before the authorities of respondent No 1 prayed that she is entitled for the admission in Post Graduation on the basis of graduation degree obtained from University of Kashmir However she is prepared to do the Bridge course and she is also even prepared to get her admitted in third year course of B Sc and she may be allowed either of the three so that she may continue her academic career Father of petitioner also wrote a letter to the respondent No 2 explaining the difficulties However the request of the petitioner was turned down firstly by the order dated 29th Sept 1989 which has been filed as Annexure VI to the writ petition In the order this much has been said that in M A M.Sc M Com classes only candidates who had done three year course successfully are considered for admission Another order was passed on 6th January 1990 by which she was intimated that there was no provision for admitting the student in third year of B Sc degree course who has done first and second year in other University The petitioner in the writ petition has also mentioned that she was informed that the Bridge course has also been abolished Hence there is no way open to her to get admission in M Sc In the aforesaid facts and circumstances the petitioner filed the present writ petition in this court for the reliefs to quash the aforesaid two orders and further to direct the respondents to admit the petitioner in M Sc course

3 The respondents 1 to 3 after service of the notice have filed a counter affidavit and they have taken a stand that the orders have been rightly passed as a candidate is eligible for admission in M Sc previous only if he has done three years degree course for obtaining graduation degree under 10 + 2 + 3 Scheme In Para 7 of the counter affidavit it has also been admitted that the Bridge course has been abolished, hence the petitioner was not admitted in Bridge course It has also been stated in the counter affidavit that she cannot be admitted to third year course of B Sc in view of the Ordinance of the University and the order have been rightly passed The said orders have been justified on the ground that the Ordinance of the University does not permit either of the three prayers made by the petitioners In this writ petition counter and rejoinder affidavits have been exchanged and the learned counsel for the parties agreed that the writ petition may be heard and finally disposed of at the stage of admission

4 I have heard learned counsel for the petitioner and learned counsel for the respondents

5 Sri Keshari Nath Tripathi appearing for the petitioner has challenged the orders passed by the respondents on the ground that they are arbitrary and illegal and violative of Art 14 of the Constitution of India The respondents cannot refuse admission to the petitioner as the degree awarded by the University of Kashmir has been recognised by the respondent No 1 equivalent to the degree awarded by the Allahabad University The respondents were not justified in creating class among the various degree holders on the basis of the period prescribed in different Universities for completing the said course Section 6 of the U P State Universities Act 1973 (hereinafter referred to as the Act) has been referred to in support of the above contention Sri Tripathi also referred to Art 41 of the Constitution of India contained in Part IV that the petitioner's right to education cannot be defeated in this manner by the University authorities The doors for further academic education have been closed by the University for all times The petitioner being a female cannot go elsewhere to pursue her further study nor can she live with her father as he is posted at field area The documents have been filed in support of the contention that her father is posted in field area and is not allowed under the Army Rules to keep family

6 Sri Haider Husain learned counsel for the respondents on the other hand, contended that the authorities of the University are bound by their Ordinance which prescribes the right of admission in the Universities He referred relevant Ordinance regulating the admission for the degree of Master of Science The learned counsel has reiterated the stand taken in the counter affidavit that the Bridge course having been abolished and the petitioner having the graduation degree with two years course cannot be admitted in M Sc previous in view of the provisions contained in Ordinance No 5 In respect of the recognition by the Allahabad University of the graduation degree awarded by Kashmir University, the learned counsel stated that the same is subject to the other Ordinance and that cannot give right to the petitioner to get admission in M Sc previous He relied on the case AIR 1987 SC 57 University of Allahabad v Amrit Chandra Tripathi for the contention that the University is bound by its Ordinance and the orders passed are justified Sri Haider Husain further contended that the petitioner has not challenged the validity of the Ordinance on the ground of Art 14 and Art 41 of the Constitution and Section 6 of the Act as argued by the learned counsel for the petitioner and the argument cannot be advanced at this stage without laying down the foundation for the same in the writ petition

7 After hearing learned counsel for the parties in my opinion the question which falls for consideration is as to whether the students like petitioner who have obtained graduation degree with two years course have any right to admission for doing Post Graduation or not under the relevant Ordinance and as to whether the orders passed by the respondents on the basis of the Ordinance relied on are correct and legal and do not offend valuable right to further education of the petitioner The foremost consideration in this respect is as to whether University authorities are justified in creating class of the students, having graduation degree with three years course, only eligible for the Post Graduation and closing the doors for those who obtained graduation degree with two years course In my opinion this classification is arbitrary and violative of Art 14 of the Constitution of India and since by the attitude adopted the right of education is closed for ever to those who obtained graduation degree in two years, the right provided under Art 41 of the Constitution is also violated It is well known that Art 41 in itself cannot be enforced but since the action of the authorities of respondent No 1 is clearly arbitrary and discriminatory and Art 14 is attracted the right of the petitioner under Art 41 which creates sacred obligation to the State to provide effective provision of right of education is also attracted In my opinion it is this right which has been incorporated in Sec 6 of the Act which reads as under —

> University open to all classes and creeds The University shall be open to all persons irrespective of class or creed but nothing in this section shall be deemed to require the University to admit to any course of study a larger number of students than may be determined by the Ordinance
>
> Provided that nothing in this section shall be deemed to prevent the University from making special provisions for admission of students belonging to the Scheduled Castes or Scheduled Tribes

The learned counsel for the respondents is not justified in saying that no foundation has been laid down for the aforesaid argument in the writ petition In Para 20 of the writ petition and in ground (b) it has been specifically stated that the denial of the petitioner's admission in M Sc course on the ground that the petitioner possesses the Graduate degree of two years course is discriminatory and violative of Art 14 of the Constitution On the other hand in the counter affidavit no reply has been given to this question In the relevant paragraph 16 in which para 21 has been referred to nothing has been said so far as this aspect of the matter is concerned The only fact reiterated is that the petitioner cannot be admitted as the Bridge course has been abolished

8 It is well known that M A and M Sc courses are permitted in particular subject only It could be seen by the University authorities as to whether the student seeking admission in M A or M Sc previous had that particular subject while doing B A or B Sc course Such a consideration could only be said to be relevant while considering the case of a candidate seeking admission to the Post Graduate course of M A or M Sc The graduation degrees could not be legally distinguished for purposes of admission only on basis of the years prescribed for doing the course No material has been filed or placed before the court to establish any differnce in academic sense For all purposes the graduation degree, whether obtained on the basis of two years or three years course is given same value In my opinion, petitioner is fully entitled for being admitted in M Sc previous course on basis of the graduation degree possessed by her The distinction made and adhered to by respondents as such does not appear to be substantive and real so far the admission to M A or M Sc previous is concerned

9 It is relevant to mention here that the University has recognised the degree course and other degrees awarded by the other Universities and list of such Universities has been given in Chapter XLVIII In this list the degree of Jammu and Kashmir University has been recognised on the reciprocal basis for purposes of admission to M Sc classes of the Allahabad University There is no mention that only B Sc degree with three years course shall be recognised for the purposes of admission in M Sc previous Whereas in the same list in respect of other Universities it has been clearly provided that B A B Sc and B Com three years degree course is recognised for admission in M A M Sc and M Com courses In respect of Andhra University three years course has been recognised There is a long list from which it appears that the distinction has been made and only in respect of some Universities the graduation degree with three years course is recognised for purposes of admission Considered in this view also the University authorities cannot be justified in refusing admission to the petitioner The power to recognise the degree of other Universities flows from Section 45(3) of the Act which reads as under

> The University shall have the power to recognise (for the purposes of admission to a course of study for a degree), as equivalent to its own degree any degree conferred by any other University or as equivalent to the Intermediate Examination of any Indian University any examination conducted by any other authority

After having recognised the degree of Kashmir University with two years course for purposes of admission to M Sc previous examination, the respondents cannot legally say that the petitioner is not qualified for joining the M.Sc. previous. The qualification for admission to M.Sc. previous course is B.Sc. degree. The same course could be taught and studied in two years as well as in three years. In many Universities the same course is still being taught in two years. To create distinction between graduation degrees on basis of years in which its course has been completed is wholly illegal and arbitrary for refusing admission. The stand taken by the respondents is contrary to the provisions of Section 45(3) of the Act.

10. Though as clear from the above the petitioner is entitled for admission in M.Sc. previous on the basis of B.Sc. degree obtained from Kashmir University irrespective of the fact that it was done in two years, however as the respondents have contended that she is not entitled for admission as the Bridge course has been abolished, the controversy regarding the Bridge course has also to be considered. In Ordinance No. 5 which was made as transitory Ordinance for such students who obtained graduation degree with two years course Bridge course has been provided so that such students, if for some reasons could not pursue their further studies could join University again after completing the Bridge course. The Ordinance No. 5 thus kept the gates open to such students by providing the provision of Bridge course. However unfortunately the stand of the respondents is that the Bridge course has been abolished which means a complete closure of the academic career of the students with two years degree course. During the argument no Ordinance has been placed before me abolishing the Bridge course. Learned counsel for the respondents however placed before me Resolution No. 130 of the Academic Council dated 9th December, 1988 and stated that by this resolution the Bridge course has been abolished. This resolution cannot be given any value for the reasons that firstly it relates to the Arts Bridge course and secondly in this very resolution it has been stated that so far as the question of recognition of the Bridge course of other Universities is concerned with regard to admission in Post Graduate classes at this University the matter be referred to the Equivalence Committee for consideration. It is clear from Section 52 that the Ordinance is made by the Executive Council and the Academic Council only makes proposal for the same. No resolution of the Executive Council was produced before me showing that the Bridge course has been abolished. Further no opinion of the Equivalence Committee for derecognising the Bridge course of other Universities has been placed. In these facts and circumstances it cannot be said that the Bridge course contemplated by Ordinance No. 5 has been abolished. No facts as to how and when the said Bridge course was abolished by amending Ordinances has been mentioned in the counter affidavit. Though it will be another serious question as to whether the Bridge course provided for such students can be legally abolished which shall close the doors for the students with two years degree course for ever. However in the present case as I am not satisfied that such course has actually been abolished in accordance with law, I am not expressing any opinion about the validity of the alleged abolition. The stand taken by the respondents is thus unjustified in this regard also.

11. The learned counsel for the respondents placed reliance on AIR 1987 SC 57, in which the question involved was as to whether the University authorities were competent to introduce entrance test for admission to degree courses in Arts, Science and Commerce. After considering various provisions of Act it was held that entrance examination has rightly been introduced and in this context their Lordships held taht that the University authorities are bound by the Ordinance. The position of law expressed by Hon'ble Supreme Court cannot be disputed. However facts of the present case are altogether different. It is not disputed that the University is a State within the meaning of Article 12 of the Constitution of India and its action are subject to Article 14 thereof. Any action of the respondents closing the doors of

the temple of education in arbitrary and discriminatory manner by creating imaginary classification cannot be permitted which is violative of Article 14 of the Constitution The right of education is a valuable right and it cannot be curtailed unless the candidate seeking admission in the University is not entitled for same for any legal and valid reason In my opinion the respondents were not justified in refusing admission to the petitioner in M Sc previous course Petitioner completed her graduation degree and was declared successful in May 1 1989 She has been deprived of her further pursuit of studies for more than a year by respondents in arbitrary and illegal manner After loss of so much time, due to illegal action of respondents in my opinion, it would not be in the interest of justice to compel petitioner to go for completing the Bridge course, which shall cause to her a further loss of time for no fault of her own It also does not appear necessary as the respondents have failed to prove any difference in B Sc course prescribed in Kashmir University and in the University of Allahabad

12 For the reasons stated above, the petitioner is entitled for the reliefs claimed in the writ petition The impugned order dated 29-9-1989 (Annexure VI) is hereby quashed and the respondents Nos 1 to 3 are directed to allow admission to the petitioner in M Sc previous without any further delay if she is otherwise qualified for the same and fulfils other necessary conditions for the same She shall not be denied admission on basis of the fact that she possesses B Sc degree with two years course In view of the aforesaid direction, there is no necessity of quashing impugned order dated 6-1-1990 (Annexure VIII) by which she has been refused admission in B Sc IIIrd year examination

13 The writ petition is thus allowed There will be no order as to costs

Petition allowed

1991 ALL L J 717

FULL BENCH

V K KHANNA R A SHARMA AND
R R K TRIVEDI, JJ

Brijendra Kumar Chaudhari and another, Petitioners v The State Transport Authority U P Lucknow and others, Respondents

Civil Misc Writ Petn No 25646 of 1990 (with Civil Misc Writ Nos 25671 25780, 25769 and 33187 etc etc of 1990) D/- 30-5-1991

Motor Vehicles Act (59 of 1988), Ss 2(7), 74 — Contract carriage — Definition is exhaustive — Mini buses plying as contract carriages — Cannot pick and choose individual passengers — Prior contract with names of passengers mentioned is a must

The mini buses running as contract carriage cannot pick up individual passengers and can only run in accordance with the new definition of the contract carriage as given in the New Motor Vehicles Act i e they will have to enter into a prior contract which can be only one and can be express or implied but the names of the passengers which are being carried on under that contract have to be mentioned This safeguard the legislature has put in for the purposes that at the time of checking the vehicle, it can be verified as to whether the vehicle is in fact, being used as a contract carriage or a stage carriage

(Paras 15, 17)

In the case of contract carriage there is a prior contract by the passenger or passengers for the carriage to be used as a whole for a fixed or agreed sum In the case of stage carriage there is absence of such a prior contract and it is boarded by passengers en route who pay the fare for the distance they propose to travel (Paras 8, 9)

The definition of contract carriage provided under Section 2(7) of the New Act is exhaustive and takes into its fold all types of vehicles which are permitted to ply as contract carriage irrespective of their size and seating capacity The words "means and include are generally used for inclusive definition and do not connote an exhaustive definition However the definition of contract carriage reveals that in the main part of the definition which appliess to all vehicles certain conditions have been laid down for making it a contract carriage Exception has been made in the case of maxi cab and motor cab notwithstanding that separate fares are charged from its passengers The definition read as a whole makes it clear that the definition is exhaustive The main part of the definition applies to all the motor vehicles and a motor vehicle will become a contract carriage if all the conditions laid down in the main part are satisfied However, maxi cab and motor cab will also be included in the definition of contract carriage notwithstanding that separate fares are charged from its passengers By no stretch of imagination it can be said that mini bus can be included in the definition of either maxi cab or motor cab

(Para 14)

Cases Referred Chronological	Paras
(1990) Civil Misc Writ No 25781 of 1990 (Allahabad) Smt Somudri Devi v State Transport Authority	7
AIR 1987 SC 1454	15
1986 All LJ 597 AIR 1986 SC 1112	16
(1981) Writ Petn No 9553 of 1981 (All) Sri Guru Bachan Singh case	6, 7 11 12, 15
AIR 1965 SC 991	9

M M Ghildyal, for Petitioners

V K KHANNA, J — The questions of law and facts involved in all these connected writ petitions are the same Learned Counsel for the petitioners at the very outset have made a statement before us that they will address only one arguments in all these writ petitions Similar is the statement of Sri A P Singh, Chief Standing Counsel, appearing on behalf of the respondents It is in these circumstances that these writ petitions are being disposed of by a common judgment and writ petition No 25646 of 1990 has been made the leading case with the consent of the parties and for the purposes of adjudication of these writ petitions the facts of the aforesaid writ petition No 25646 of 1990 are being taken into consideration

2 The main controversy which is involved in all these writ petitions is as to whether the petitioners, who are Mini Bus contract carriage permit-holders are entitled to pick up individual passengers at the starting point of their journey

3 For the purposes of adjudicating the controversy in the present writ petitions it would be worthwhile to reproduce the relevant provisions of the Motor Vehicles Act, 1939 (hereinafter described as the Old Act') and the Motor Vehicles Act 1988 (hereinafter described as the 'New Act)

4 The Old Act recognised the following types of motor vehicles

(a) "Motor Cab '- means any motor vehicle constructed adopted or used to carry not more than 6 passengers excluding the driver for hire or reward (Section 2(15))

(b) "Stage Carriage means a motor vehicle carrying or adopted to carry more than six persons excluding the driver which carries passengers for hire or reward at separate fare paid by or for individual passenger either for the whole of the journey or for stages of the journey (Section 2 (29))

(c) 'Contract Carriage' means a motor vehicle which carries a passenger or passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum and from one point to another without stopping to pick up or set down along with line of route passengers not included in the contract, and includes a motor cab notwithstanding that the passengers may pay separate fares

EXPLANATION

"Contract Carriage" does not include a motor vehicle possession of which has been temporarily transferred in accordance with an expressed agreement of hire for use as a private vehicle and which is used in accordance with the term of such agreement

Note Explanation was subsequently omitted by the Motor Vehicle (Amendment) Act 1956 Act No 100 of 1956 with effect from 16-2-1957

5 The definition of the term contract carriage was amended by the Motor Vehicles (Amendment) Act 1969 (Act No 56 of 1969) with effect from 2-3-1970 and after amendment it read as under

> "Contract carriage means a motor vehicle which carries a passenger or passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate of sum —
>
> (i) on a time basis whether or not with reference to any route or distance or
>
> (ii) from one point to another and in either case without stopping to pick up or set down along the line of the route passenger not included in the contract, and includes a motor cab notwithstanding that the passenger may pay separate fare

It appears that in practice even though the Transport Authorities started granting contract carriage permits to mini buses but in fact these mini buses were rarely plied as contract carriages but were being plied as stage carriages on even notified routes Strict enforcement of the conditions of permits were enforced in the State of U P which result in a large number of mini bus operators being thrown out of operation The State Legislature, therefore enacted U P Act No 27 of 1976 It will be useful to reproduce the statement of object and reasons of the aforesaid Act

> A large number of "mini buses were granted permits under the Motor Vehicles Act, 1939 for being plied as ' contract carriages' In actual practice, however, they were rarely plied as contract carriage but were commonly plied as stage carriage With a view to stopping this flagrant disregard of law the State Government issued strict orders for the enforcement of the conditions of permit This led to the throwing out of employment of a large number of mini bus operators and also to throwing out of use of a large number of mini buses which could be put to productive use It has therefore been decided that the operator of such mini bus may on certain conditions be allowed to operate on a specified nationalised routes subject to certain financial and administrative arrangements with the U P State Road Transport Corporation It is also proposed to allow them to operate on certain new routes and on routes covered by scheme published under Section 68C of the Act It is necessary to make specific provision in law for achieving the above object

The mini buses were introduced as a different class of vehicles and the same have been defined in Section 2(d) of the U P Motor Vehicles (Special Provision) Act 1976 (U P Act No 27 of 1976) as under

> Mini Bus means Mini bus which is constructed or adopted to carry not more than 35 passengers excluding the driver "

It would thus be seen that "mini bus ' was defined for the first time in the aforesaid Act which was intended to rehabilitates mini buses by permitting them to be used as stage carriages on the basis of authorisation certificate which could be granted under Section 4 of 1976 Act on notified routes

6 It may also be noticed that large number of permit holders of mini buses filed writ petitions in this Court seeking for a writ of mandamus restraining the respondent-Transport Authority not to interfere with the petitioner's plying their contract carriage vehicles, and not to interfere with their right of picking up individual passengers at the starting point of journey over notified routes Writ Petition No 9553 of 1981 was filed on behalf of Sri Guru Bachan Singh and others which was connected with other writ petitions and was decided by a Division Bench of this Court on the ground that the Transport Authority had granted contract carriage permits permitting the Mini buses to be plied

as motor cabs. The Bench held that the only restriction which was placed on the petitioners' vehicles was that it could not stop between one point to the other to set down and pick up passengers, ordinarily contract carriage permit holder is entitled to carry passengers from one point to another. It was specifically held by the Bench that if the contract carriage permit itself authorises the vehicle to be used as motor cab, the operator will be free to book individual passenger from one point to the other without setting down or picking up passengers in between two points.

7. It is in view of the aforesaid decision given in the case of Gur Bachan Singh (supra) that the other Division Benches of this Court subsequently held that a mini bus contract carriage operator can pick up passengers at the starting point of journey. One such judgment Division Bench has been noticed in the case of Akhilesh Kumar and others v. State Transport Authority U. P. and others decided on 21-8-1990. When this matter came up before the Bench in the case of Smt. Samudri Devi v. State Transport Authority (Civil Misc. Writ No. 25781 of 1990) it was felt by the Division Bench that in view of the changed definition of 'contract carriage' in the new Act, in the opinion of the Bench mini bus contract carriage holder could not pick up any individual passenger as he is entitled to pick up only those persons who are mentioned in the contract wherein the vehicle is engaged for its use as a whole. The Division Bench was of the opinion that the decision given in the case of Gur Bachan Singh (supra) and other Division Bench decisions require reconsideration in view of the changed definition given in the New Act.

8. The old Motor Vehicles Act has now been repealed and Section 2(7) of the New Act defines 'contract carriage" as follows —

"(7) Contract carriage" means a motor vehicle which carries a passenger or passengers for hire or reward and is engaged under a contract, whether express or implied for the use of such vehicle as a whole for the carriage of passengers mentioned therein and entered into by a person with a holder of a permit in relation to such vehicle or any person authorised by him in this behalf on a fixed or an agreed rate or sum

(a) on a time basis, whether or not with reference to any route or distance, or

(b) from one point to another

and in either case, without stopping to pick up or set down passengers not included in the contract anywhere during the journey, and includes

(i) a maxi cab, and

(ii) a motor cab notwithstanding that separate fares are charged for its passengers."

From the new definition of the contract carriage it is thus clear that the following ingredients should be present before it becomes a contract carriage

(i) It should carry passenger,

(ii) Such carrying should be for hire and reward,

(iii) The motor vehicle should be engaged under a contract whether expressed or implied,

(iv) Such contract should be for the use of the vehicle as a whole,

(v) Such contract should mentioned the names of the passengers who will be carried in the motor vehicle,

(vi) Such contract should be entered into by a person with the holder of a permit in relation to such vehicle or any person authorised by him in this behalf,

(vii) Such hire or reward should be on fixed or agreed rate or sum —

(a) on a time basis, whether or not with reference to any route or distance, or

(b) from one point to another, and in either case, without stopping to pick up or set down passengers not included in the contract anywhere during the journey and includes

(i) a maxi cab, and

(ii) a motor cab notwithstanding that separate fares are charged for its passengers

If one sees the definition of 'contract carriage in the old Motor Vehicles Act and in the new Act, it is clear that the Legislature has specifically added more words to the definition i e the words "for the carriage of passengers mentioned therein These words were not there in the earlier definition In the earlier definition the 'contract carriage was to include only a motor cab Under the new definition a maxi cab has also been included If one carefully tries to find a distinction between the definition of 'stage carriage', and a 'contract carriage' as has been defined under the new Act, it will be found that in case of a contract carriage there must be a prior contract, the passengers should be settled in advance and there is no stopping on the route to pick up or set down a passenger But in the case of stage carriage there is no such prior contract, passengers are not settled in advance and the passengers may be picked up or set down at the intermediate stages

9 The Supreme Court in the case of Roshan Lal v State of Uttar Pradesh, AIR 1965 SC 991 drew a distinction between a contract carriage and a stage carriage describing the definition between the contract carriage and stage carriage as follows — (Para 8)

"The distinction between the two is this the contract carriage is engaged for the whole of the journey between two points for carriage of a person or persons hiring it but it has not the right to pick up other passengers en route The stage carriage on the other hand, runs between two points irrespective of any prior contract and it is boarded by passengers en route who pay the fare for the distance they propose to travel "

The addition of the words in the new definition of 'contract carriage" that the contract will mention the names of the passengers who are carried in the contract itself, is according to the Chief Standing Counsel, based on the past experience of the Transport Department inasmuch as a contract carriage permit is obtained with the ostensible purpose of taking a contract party from one place to another place but very often persons who are not members of the contract party are picked up at the starting point itself or at intermediary stations collecting individual lfares Thus the contract vehicles ply contrary to the permit that is granted and are plied as stage carriages collecting individual fares, picking up passengers who are in no way connected with the contract party The list of passengers is a very important piece of circumstantial evidence either to prove or disprove that a contract carriage is used as a stage carriage

From the review of the case law and from the close scrutiny of the definition in our opinion it is clear that in the case of contract carriage there is a prior contract by the passenger or passengers for the carriage to be used as a whole for a fixed or agreed sum In the case of stage carriage there is absence of such a prior contract and it is boarded by passengers en route who pay the fare for the distance they propose to travel

10 Learned counsel for the petitioners has strenuously urged before us that there could be several contracts because of the mention of the words "a passenger or passengers" in the definition of the contract carriage We are unable to agree with the aforesaid contention raised by the learned counsel for the petitioners Entire reading of the definition makes it clear that the contract has got to be one and it has got to be a prior contract before the motor vehicle is plied

11 Learned counsel for the petitioners laid great stress on the resolution passed by the State Transport Authority which is contained in Annexure '3' to the writ petition On the aforesaid basis it has been urged before us that as in the case of Gur Bachan Singh (supra) the petitioner's vehicles were being plied as motor cabs and thus were entitled to pick up individual passengers Let us first examine the resolution which has been filed as Annexure '3' to the writ petition A bare perusal of the aforesaid resolution shows that at the time of the passing of the resolution the mini buses which were being manufactured by

the manufacturers were of the capacity of carrying passengers from 8 to 20. The resolution clearly says that leaving aside all the areas and routes in which there is in prevalent scheme of contract carriages by the Roadways buses, contract carriage permits should be given to the mini buses liberally. It is important to note that it has been mentioned in the resolution that all the terms and conditions of the permit will be the same which are prevalent in the entire State in respect of motor vehicles while granting permits to them.

12. Learned counsel for the petitioners want to read that the use of the word "motor" should be read as motor cab in the aforesaid resolution. We are unable to accept the aforesaid contention raised by the learned counsel for the petitioners. It clearly says that all those conditions which are attached to the motor i.e. motor vehicles in the entire State of Uttar Pradesh will be attached to the mini buses. Moreover, the actual permits which had been granted to the petitioners have been annexed as Annexures '1' and '2' to the writ petition. A bare perusal of the Annexures 1 and 2 to the writ petition would show that the sitting capacity of the mini buses in respect of which the permit has been granted is 35. Thus mini buses have been allowed to ply like motor cabs. By no stretch of imagination to the petitioner's case the decision given in the case of Gur Bachan Singh (supra) is applicable as the mini buses of the petitioners have not been permitted to run as motor cabs.

13. Learned counsel for the petitioners has laid great stress on the last part of the definition of 'contract carriage' given under Section 2(7) of the new Act which says "notwithstanding that separate fares are charged for its passengers," and on the aforesaid basis has argued that as there could be separate fares individual passengers could be picked up from the starting point. It was also argued that the definition is not exhaustive and it is inclusive and it may include mini buses. It has been further submitted that in respect of certain class of contract carriage vehicles the transport authorities are empowered to permit them to carry individual passengers. The carrying of individual passengers, according to the petitioner's counsel, is an exception to otherwise contract carriage system the main part of the definition in Section 2(7). It has been conceded that the contract carriage vehicle can either operate on time basis or on a route but in both cases the vehicles will not pick up or set down passengers not included in the contract i.e. no individual passengers can be picked up or dropped. It has been urged that this definition is applicable to all sorts of contracting vehicles and include maxi cab and motor cab notwithstanding that different fares are charged from its passengers. This is an exception and according to the learned counsel this exception applies to the mini buses also.

14. In our opinion the definition of contract carriage provided under Section 2(7) of the new Act is exhaustive and takes into its fold all types of vehicles which are permitted to ply as contract carriage irrespective of their size and seating capacity. The words "means and include" are generally used for inclusive definition and do not connote an exhaustive definition. However, if we look to the definition of contract carriage in the present case, we find that in the main part of the definition which applies to all vehicles certain conditions have been laid down for making it a contract carriage. Exception has been made in the case of maxi cab and motor cab notwithstanding that separate fares are charged from its passengers. Thus if we read the defination as a whole it would be clear that the definition is exhaustive. The main part of the definition applies to all the motor vehicles and a motor vehicle will become a contract carriage if all the conditions laid down in the main part are satisfied. However maxi cab and motor cab will also be included in the definition of contract carriage notwithstanding that separate fares are charged from its passengers. By no stretch of imagination it can be said that mini bus which was defined in the 1976 Act can be included in the definition of either maxi cab or motor cab. Maxi cab has been defined under Section 2(22) and means any motor vehicle constructed or adapted to carry more than six passengers, but not more

than twelve passengers including the driver, for hire or reward A 'motor cab means any motor vehicle constructed or adapted to carry not more than six passengers excluding the driver for hire or reward In the 1976 Act mini bus means mini bus which is constructed or adapted to carry not more than 35 passengers excluding the driver The permits which have been granted to the petitioner also shows that the Legislature was conscious that mini bus was a separate class of motor vehicle and in the case the intention of the Legislature was to include mini bus also in the definition of the 'contract carriage' we see no reason as to why mini bus' would not have been included specifically in the last part of the definition of the contract carriage

15 We are further of the opinion that in view of new definition of the 'contract carriage , petitioners would not be entitled to run it as a contract carriage with a right to pick up individual passengers A bare perusal of the definition of the contract carriage would show that the definition is exhaustive By no stretch of imagination the petitioners' mini buses if they are run as stage carriages, i e if they are picking up individual passengers, can come under the main definition Let us see whether the petitioners' case could be covered by the latter part of the definition of 'contract carriage' Because of the last part of the definition of contract carriage, it has been made clear that it would include a maxi and a motor cab notwithstanding the fact that separate fares are charged from its passengers Petitioners admittedly do not claim themselves to be running a maxi cab The petitioners cannot also say that their vehicles are motor cabs The argument raised by the learned counsel for the petitioners that even if the definition of contract carriage has been changed under the new Motor Vehicles Act the ratio of the Guru Bhachan Singh's case (supra) is still applicable in our opinion, is not tenable In this connection it will be useful to refer to the dictum of the Supreme Court in the case of Utkal Contractors and Joinery Pvt Ltd v State of Orissa, AIR 1987 SC 1454 It has been held (Para 9)

> " No provision in the Statute and no word of the statute may be constructed in isolation Every provision and every word must be looked at generally before any provision or word is attempted to be construed The setting and the pattern are important It is again important to remember that Parliament does not waste its breath unnecessarily Just as Parliament is not expected to use unnecessary expression, Parliament is also not expected to express itself unnecessarily Even as Parliament does not use any word without meaning something Parliament does not legislate where no legislation is called for Parliament cannot be assumed to legislate for the sake of legislation nor can it be assumed to make pointless legislation Parliament does not indulge in legislation merely to state or to do what is already validly done Again while the words of an enactment are important, the context is no less important

We are thus of the opinion that the Parliament obviously sought to make the definition of the term "contract carriage " more explicit so as to specifically exclude the carriage of individual passengers not included in the contract

16 There is no difference between a contract carriage with right to pick up individual passengers at the starting point of journey and a stage carriage with corridor restriction A stage carriage with corridor restrictions picks up passengers at the starting point of journey and drops them at the last termini of the route without right to pick up or drop passengers on the notified route between two termini A contract carriage with a right to pick up individual passengers at the starting point does the same thing as it picks up individual passengers at the starting point and drops them at the last termini It is not disputed that contract carriage mini buses are operating on the nationalised routes The Supreme Court in the case of Sumer Chand v State of U P , AIR 1986 SC 1112 (1986 All LJ 597) has condemned the practice developed in this State of allowing stage carriages with corridor restrictions on the nationalised routes Relevant extract from the judgment of the Supreme Court mentioned above is reproduced below

"Despite the statutory prohibition against any private operator plying a stage carriage on any part of the nationalised route in the absence of a provision in the Scheme of nationalisation, it appears that a practice grew up (we have borrowed the word 'practice from one of the judgments of Allahabad High Court, which was cited before us), in Uttar Pradesh, of permitting private operators to ply their stage carriages over common sectors of nationalised routes provided they did not set down or pick up passengers at any point on the common sectors The "practice" was wholly unauthorised and without any legal sanction whatsoever "

If the contract carriage buses are permitted to pick up individual passengers at starting point, it will be doing nothing but plying as stage carriage with corridor restrictions which has been frowned by the Supreme Court in the case of Sumer Chand (supra) By mere change of label what is prohibited can not be permitted to be done

17 For the reasons stated above, in our opinion, the mini buses cannot pick up individual passengers and can only run in accordance with the new definition of the contract carriage as given in the new Motor Vehicles Act i e they will have to enter into a prior contract which can be only one and can be express or implied but the names of the passengers which are being carried on under that contract have to be mentioned The safeguard the legislature has put in for the purposes that at the time of checking the vehicle, it can be verified as to whether the vehicle is in fact, being used as a contract carriage or a stage carriage

18 For the reasons stated above all the writ petitions fail and are dismissed However, there shall be no order as to costs

Petition allowed

1991 ALL L J 724

R B MEHROTRA J

Krishak Shiksha Pracharini Sabha, Khairgarh and others Petitioners v The Commissioner, Agra Division, Agra and others, Respondents

C M W P No 14373 of 1990, D/-19-4-1991

Societies Registration Act (1860), S 12D (as amended in U P) — Powers of registrar — Only power of cancellation of registration is within his jurisdiction — Renewal of registration of society with particular name, or recognising anybody as manager or member of society — Not permissible

Section 12D of the Act (as amended in U P), only confers powers for cancellation of a registration in the circumstances given in the Act The section does not confer any power for recognising anybody as Manager or member of the Society or renewing the registration of the Society with a particular name Therefore, the order passed by the Assistant Registrar, renewing the registration of the society with the old name of the Society and recognising respondent as Manager and the list submitted by him as members of the Society, was patently outside the scope of Section 12D of the Act (Para 11)

Cases Referred	Chronological Paras
AIR 1984 All 310 1984 UPL B & EC 1069 (sic)	10

Mr Ashok Bhusan, for Petitioners, S C , for Respondents

ORDER — Assistant Registrar, Firms, Societies and Chits, exercising powers under Section 12(D) of the Societies Registration Act, 1860, as amended by the State of U P cancelled the registration of the petitioner's Society, vide his order dated 20-5-1988, taking a view that the change of the name of the society was not done in accordance with the registered bye-laws of the Societies and further directing that the application for renewal of the Society, moved by Sri Ishwar Dayal Gupta, Manager of 'Mathur Vaishya Shiksha Paracharini Sabha' Khairgarh (Manipuri) is renewed for two years from 10-10-1979, 10-10-81 and 10-10-83 and permitting them to file the list of the members of their society for the year 1988-89, under Section 4K of the Societies Registration Act

2 Aggrieved by the aforesaid order, the petitioners filed an appeal before the Commissioner of the Division, who, vide his order dated 16-5-1990, dismissed the petitioners' appeal almost in limine, holding that the view taken by the Assistant Registrar is correct in the circumstances of the case

3 In the present writ petition, under Art 226 of the Constitution of India, the petitioners have challenged the aforesaid two orders passed by the Assistant Registrar, Firms, Societies and Chits, Agra dated 20-5-1988 and the order of the Commissioner dated 16-5-1990

4 The question involved for consideration of the present writ petition is regarding the scope of Section 12(D) of the Societies Registration Act For convenient reference, the aforesaid section is being reproduced below

"12-D Registrar's power to cancel registration in certain circumstances— (1) Notwithstanding anything contained in this Act, the Registrar may by order in writing, cancel the registration of any Society on any of the following grounds —

(a) that the registration of the Society or of its name or change of name is contrary to the provisions of this Act, or of any other law for the time being in force,

(b) that its activities or proposed activities have been or are or will be subversive of the objects of the society or opposed to public policy,

(c) that the registration or the certificate of renewal has been obtained by misrepresentation or fraud,

Provided that no order of cancellation of registration of any society shall be passed until the society has been given a reasonable opportunity of altering its name or object or of showing cause against the action proposed to be taken in regard to it

(2) An appeal against an order made under sub-section (1) may be preferred to the Commissioner of the Division in whose jurisdiction the Headquarter of the Society lies within one month from the date of communication of such order

(3) The decision of the Commissioner under sub-section (2) shall be final and shall not be called in question in any court

5 Before I consider the question whether the order of the Registrar is within the purview of the Section 12D of the Act, some facts are necessary for the decision of the case

6 The petitioner s Society is registered as Krishak Shiksha Pracharini Sabha Initially, the Society was registered in the name of 'Mathur Vaishya Shiksha Pracharini Sabha and was registered in the year 1966 under Societies Registration Act The name was subsequently changed by the society in the year 1979 In the year 1976, some controversy arose between two rival contenders, claiming themselves to have been duly elected as president and members of the Society The election was challenged in a writ petition before this Hon'ble Court but the writ petition was dismissed

7 Subsequent thereto, Sri Netra Pal Sharma the then Manager applied for the renewal of the Society, under Section 3A of the Societies Registration Act on 29-1-1979 Respondent No 4 also claimed renewal of the society in his favour The Deputy Registrar, Firms, Societies and Chits, U P Lucknow, after considering the claim of both the claimants, recognised Sri Netra Pal Sharma as Manager of the Society The renewal was made in favour of Sri Netra Pal Sharma from August, 1977 for two years The order was sought to be reviewed but the review application was rejected by the Deputy Registrar on 27-9-1979 The respondent No 4 then filed

an application under Section 25 of the Societies Registration Act Challenging the validity of the election and members of the Society of which Sri Netra Pal Sharma was recognised as Secretary The Prescribed Authority dismissed the application of respondent No 4 by his order dated 21-5-1982 Aggrieved thereby the respondent No 4 filed a writ petition in this Hon ble Court, being writ petition No 9731 of 1982 The writ petition is pending consideration of this Court but no interim order was passed in favour of respondent No 4

8 When in the year 1979, the name of the Society was changed an approval was sought from the registrar, as required under the provisions of the Act The Registrar, after satisfying itself, regarding compliance of the Act and the Rules in connection with the change of the name, permitted the Society to change its name as 'Krishak Shiksha Pracharini Sabha' in place of 'Mathur Vaishya Shiksha Pracharini Sabha' Subsequent thereto the registration of the Society with the changed name was renewed in the year 1981 for two years and in the year 1983 again for two years The petitioners applied for fresh renewal after a lapse of two years in the year 1986 At this stage, the respondent No 4 again started agitating the matter and filed an application stating that since the matter is pending decision in the Hon ble High Court in writ petition No 9731 of 1982, the renewal of the Society should not be made till the decision of the writ petition However, in the year 1988 the respondent No 4 made another application that the Society should be renewed with the name of 'Mathur Vaishya Shiksha Pracharini Sabha, and respondent No 4 should be recognied as its manager with other members mentioned by the respondent No 4 in his list and made allegation that the change of name of the Society was illegally done by the petitioners On the aforesaid application, the Registrar issued notice to both the parties on 16-1-88, fixing 15-2-88 on the question as to whether the change of name of the Society was done in accordance with the provisions of the bye-laws of the Society and as to whether the Society can be renewed with the name of 'Mathur Vaishya Shiksha Pracharini Sabha' This notice is alleged to have been issued in exercise of powers under S 12D of the Societies Registration Act In response to the afore-said notice the petitioners filed their reply wherein the petitioners categorically stated that in the General Body meeting not only the name of the Society was changed but the bye-laws of the Society were also suitably amended so as to enable the members of all other communities to become members of the General Body of the Society and the said change in the bye-laws and its name was duly approved by the Registrar of the Societies As such, after a lapse of 10 years, there is no question of making up of issued regarding change of name The Assistant Registrar rejected the petitioners objection vide his order dated 20-5-88 and held that the change in the name of the Society was done contrary to the provisions of the bye-laws and renewed the Society with the name of Mathur Vaishya Shiksha Pracharini Sabha recognising respondent No 4 as its Manager and the list submitted by the respondent No 4 as members of the Society, primarily this order is under challenge in the present writ petition

9 I have heard Sri Bhushan, the counsel for the petitioners and Sri Tej Pal the counsel for the respondents The writ petition was listed for admission but with consent of the counsel for the parties, the writ petition is being finally disposed of at the admission stage

10 Two questions require consideration in the present matter Firstly, as to whether the Assistant Registrar was justified in renewing the Society with its old name and recognising respondent No 4 as Manager and other members of the Society, in exercise of its powers, under S 12D of the Societies Registration Act This Court had occasion to consider the scope of S 12D in the case of Managing Committee Sri Sanatan Dharm Sanskrit Pathshala v State of U P reported in 1984 U P Local Bodies and Educational Cases, page 1069 (AIR 1984 All 310) (sic) In this decision, this court has taken a view that so far as the question of membership is concerned the same is completely outside the purview of S 12-D

11 Section 12-D only confers powers for cancellation of a registration in the circumstances given in the Act The section does not confer any power for recognising anybody as manager or member of the Society or renewing the registration of the Society with a particular name To that extent, the order passed by the Assistant Registrar, renewing the registration of the society with the old name of the Society and recognising respondent No 4 as manager and the list submitted by respondent No 4 as members of the Society, is patently outside the scope of S 12D of the Act

12 However, other question, which requires consideration in the present case is whether the Assistant Registrar was justified in cancelling the name of the Society on the ground that in changing the name of the Society, the bye-laws of the Socity were not followed In this connection the petitioners have raised two defences Firstly, for 10 years the Society was continued to be renewed with new name and the Registrar approved the same The controversy whether the Registrar has rightly approved the name or not, is pending consideration of this Hon'ble Court in writ petition No 9731 of 1982 As such the Registrar could not have decided the matter The second objection of the petitioners was that while changing the name of the Society the bye-laws were also duly changed and the changed bye-laws were also approved by the Registrar In taking a view the Assistant Registrar has failed to consider both the afore-said objections, raised by the petitioners and has taken a view that the change of the name was made in contravention of the provisions of the bye-laws

13 I am clearly of the opinion that in writ petition No 9731 of 1982, the controversy involved for consideration is substantially the same, which the respondents were raising before the Assistant Registrar and since Hon'ble High Court itself is seized of the controversy, it was not proper for the Registrar to have decided on the said issue, particularly, if the Society was being renewed for the last 10 years with the changed name, there was no justification for the Registrar to have himself decided that said controversy in exercise of powers under S 12D of the Societies Registration Act

14 In the facts of the present case the Registrar was not justified in taking a view that the name of the Society was wrongly changed

15 In this view of the matter, I am clearly of the opinion that the order of the Assistant Registrar dated 20-5-88 and the order of the Commissioner dated 16-5-90 are vitiated in law and are liable to be set aside and accordingly, I allow the writ petition, set aside the order of the Assistant Registrar dated 20-5-88 and the order of the Commissioner dated 16-5-90

16 Parties will bear their own costs

Petition dismissed

1991 ALL L J 727

A N VARMA, J

Smt Sushila Devi, Petitioner v Deputy Director of Consolidation Uttar Pradesh, Lucknow and others, Respondents

Civil Misc Writ Petition No 3555 of 1979, D/- 5-4-1991

U P Consolidation of Holdings Act (5 of 1954), S 9 — Consolidation proceedings — Determination of land in excess of permissible limits — Transfer of Bhumidhari Rights alleged — Transfer would take place from date of deposit of 20 times land revenue and not from date on which Sanad (Certificate) was issued (Para 6)

Cases Referred Chronological	**Paras**
AIR 1971 All 526 1971 All LJ 937 (FB)	5

Mr R Dwivedi Mr V K Tewari and Mr N K Saxena, for Petitioner K B Garg and Standing Counsel for Respondents

ORDER — Notice on this review application was issued by this Court while admitting the review application by its order dated 1-12-

1988 According to the office report, the respondents have been duly served with the notices of the review application No one has, however appeared in response to that notice I am accordingly proceeding to dispose of the matter finally

2 The facts necessary for the disposal of the review application are not in dispute The land in question is plot No 290 khata No 29 area 4 65 acres, situated in Village Sorna , Pargana Orai, district Jalaun The petitioner purchased this land under a registered sale deed dated 26-6-1969 executed by one Chatur Singh, opposite party No 3 On the basis of the sale deed the petitioner applied for mutation This was rejected by the Sub-Divisional Magistrate by his order dated 17-7-1971 The petitioner appealed against that order before the Commissioner while that appeal was pending, the village in question came within the purview of the consolidation operations started under the U P Consolidation of Holdings Act, as a consequence of which the appeal abated The petitioner thereupon filed application for mutation before the Consolidation Officer under S 9 of the U P Consolidation of Holdings Act Chatur Singh and Gaon Sabha filed objections against the same but the Consolidation Officer allowed the mutation application and rejected the objections filed by the Gaon Sabha and Chatur Singh

3 Aggrieved by that order, both the objectors filed an appeal which was allowed by the Settlement Officer, Consolidation by his order dated 1-8-1974 The main ground on which the appeal was allowed was that after the transfer the petitioner came to possess land in excess of permissible limit by 2 49 acres which was liable to vest in Gaon Sabha

4 Aggrieved by this order, the petitioner filed a revison before the Deputy Director of Consolidation which was dismissed by an order dated 19-2-1976 The order was based on the premise that the date of acquisition of bhumidhari rights would be the date of declaration i e the actual grant of sanad and not the date of deposit of twenty times annual rent in pursuance of the sale deed Consequently, it was held that the execution of the sale deed in favour of the petitioner and deposit of 20 times of the land revenue by the latter on 26-6-1969 would not result in the transfer of bhumidhari rights in favour of the petitioner

5 Against this order the petitioner filed a petition under Art 226 of the Constitution which was dismissed summarily by this Court on 21-5-1979 Subsequently the petitioner filed a review application on the ground that the controversy involved in the case was directly convered by a Full Bench decision of this Court reported in 1971 Allahabad Law Journal 937 AIR 1971 All 526 Banshidhar v Smt Dhirajdhari Notices were issued in the review application but none has appeared to oppose the same

6 Having heard the learned counsel for the petitioner, I am clearly of the view that the dictum of the above Full Bench directly applies to the present case This was somehow overlooked Applying the ratio of the Full Bench it is apparent that the Deputy Director of Consolidation committed a patent error of law in taking the view that the relevant date on which the petitioner would be deemed to have acquired bhumidhari rights is the date of actual grant of sanad, that is, declaration The correct petition (position) is that the relevant date is the date of deposit of 20 times of land revenue and not the date on which the certificate was issued The Full Bench decision cited above should not have been ignored by the Deputy Director of Consolidation even though it was specifically cited The Deputy Director of Consolidation completely failed to appreciate the ratio of the case The same legal error was committed by the Settlement Officer, Consolidation also The result is that both the orders passed by the Deputy Director of Consolidation and Settlement Officer, Consolidation are liable to be quashed

7 In the result, both the review applications as well as the writ petition succeed and are allowed The order dated 25-9-1979 dismissing the writ petition summarily is recalled The impugned orders dated 1-8-1974

and 19-2-1976 passed respectively by the Settlement Officer Consolidation and Deputy Director of Consolidation are both quashed The order passed by the Consolidation Officer is restored There will, however, be no order as to costs

Petition allowed

1991 ALL L J 729

RAVI S DHAVAN, J

M/s Chandra Enterprises and another, Petitioners v Cess Appellate Committee and another Respondents

Civil Misc Writ Petition No 33664 of 1990 D/- 14-12-1990

Water (Prevention and Control of Pollution) Act (6 of 1974), Pre — Water (Prevention and Control of Pollution) Cess Act (36 of 1977), Pre, S 3 and Sch I — Levy of Cess —Industry manufacturing "mill Board" i e Card Board or Hard board — Cannot escape levy on ground that it does not manufacture "paper", the item covered under Sch I

Where a Industry was manufacturing "mill board" i e Card Board or Hard Board, it could not escape the levy of Cess under the (1977) Act on the ground that the subject mentioned in the Sch I of the Act is "paper Industry" and there is difference between "paper" and "mill Board" The raw material which is used in the manufacture of mill board is not different than the raw material which produces paper The time has come that the courts and those who have been invested with the obligation to prevent pollution and impediment laws which relate to pollution do so with strictness The petitioner industry does utilise water and its daily needs for water are at the rate of 12150 kilo litres of water per day Hence, the petitioner Industry cannot be exempted from paying cess (Paras 11, 12)

A K Sharma, for Petitioners, S C, for Respondents

FI/GI/A647/91/AMG

ORDER — Messrs Chandra Enterprises, the petitioner has filed the present writ petition objecting to the cess which has been imposed upon it by the Uttar Pradesh Pollution Control Board, hereinafter referred to as the Board, under the Water (Prevention and Control of Pollution) Act, 1974 Against the order of the Board, the petitioner filed an appeal before the Appellate Committee constituted under S 13 of the Act, aforesaid, objecting to the levy of cess on the petitioner industry on the grounds (a) that it has not received any opportunity of hearing before the cess was made, (b) there was no provision to pass an ex parte order under the Act, (c) the petitioner manufactures mill board' only and, in effect, for it s manufacture this is not an industry named in Schedule I to the Act, and (d) the water which the petitioners consumes does not get polluted as it is biodegradable and the cess which is charged is excessive and illegal

2 The Cess Appellate Committee sought objections of the petitioners and declined to recall the order by which cess of Rs 16,726 50 had been imposed on the petitioners industry for the period October 1982 to June, 1989 The Cess Appellate Committee has rejected each of the contentions of the petitioner and gave reasons for it The Appellate Committee has not accepted the contention that the proceedings were ex pare as it has placed on record that the petitioners received a notice indicating a date and opportunity to comply with the provisions of the Act which the petitioners failed to do In addition, the appellate committee has also placed on record that the premises of the petitioner were inspected on 25 February, 1989 but no representative of the petitioners joined in the inspection and proceedings, thus, were not ex parte Simultaneously, the appellate committee also rejected the contention that, in the circumstances, the cess has not been rightly determined and the submission that the order was ex parte was misconceived as the petitioners had at every given stage, the record reveals were conscious of the fact that they were under notice that their premises would be inspected Thus, the Board has rightly assessed the cess under the Act

3 None of the contentions of the petitioner directly deal with the intention and purpose of the law by which cess is imposed The contentions are that the petitioner does not manufacture paper but 'mill board' The other contention is that water which it utilises and discharges after processing is biodegradable

4 The contention of the petitioners that it is not an industry which is mentioned in Schedule I upon an analogy that the subject mentioned in the schedule is paper industry and by no stretch of imagination can the product, which the petitioners manufacture be related to paper A sample of what the petitioner manufactures is filed with the writ petition It is contended on behalf of the petitioners that there is a difference between 'paper' and 'mill Board' or hard board or cardboard, whichever be the name of which this product is called

5 If arguments like this were to be permitted to defeat the intention of the law then the very purpose for which the law has been made would be defeated The intention of the legislation known as Water (Prevention and Control of Pollution) Cess Act 1977 is in it's preamble It says

"An Act to provide for the levy and collection of a cess on water consumed by persons carrying on certain industries and by local authorities, with a view to augment the resources of the Central Board and the State Boards for the prevention and control of water pollution constituted under the Water (Prevention and Control of Pollution) Act, 1974

6 The preamble also makes it clear that the purpose is to augment the resources of the Central Board and the State Board, for the prevention and control of water pollution, constituted under the Water (Prevention and Control of Pollution and Control of Pollution) Act, 1974 It is very difficult to ignore the purpose for which Water (Prevention and Control of Pollution) Act, 1974 was enacted The objects and reasons as stated, for this enactment read

"An Act to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water for the establishment with a view to carrying out the purposes aforesaid of Board for the prevention and control of water pollution for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith

Whereas it is expedient to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water for the establishment with a view to carrying out the purposes aforesaid, of Boards for the prevention and control of water pollution and for conferring on and assigning to such Boards powers and functions relating thereto "

7 The intention of the two enactments is for preventing pollution of water and maintain efforts for restoring water to its natural state after industrial use Water unquestionably is a natural resource the pollution of which is to be prevented The purpose of the two legislations is that this element of nature is not abused and to strike a balance to return to nature as part of the ecological balance system what was taken from it, otherwise, a process of depletion may set in The price of industrialisation and mass consumption of natural resources is to remove contamination in the present context which pollute water

8 The argument of the petitioner is something like this that plywood is not wood If such an argument were permitted to escape laws which control and prevent pollution, then it would be paying lip service to controls designed to prevent environmental degradation

9 The appellate committee has placed on record that the raw material which is used in the manufacture of mill board is not different than the raw material which produces paper The time, thus, has come that the courts and those who have been invested with the obligation to prevent pollution and implement laws which relate to pollution do so with strictness It is not disputed that the petitioner does utilise water and its daily needs for water are

at the rate of 12150 kilo litres of water per day This is the information furnished by the petitioners industry The petitioner draws this water from a tubewell having a capacity of 7 5 H P with a total head of 80 approximately

10 To monitor industries like the petitioners and to ensure that they conform to the purpose for which the legislation has been enacted, there are monitoring agencies referred to in the two enactments

11 It is difficult to say that the petitioner industry is out of the purview of the Act The petitioner cannot be exempted from paying cess

12 In these circumstances, from the record which is before the court, the court is not inclined to interfere in this matter, as the petitioners must conform to the controls to prevent the pollution of the water which it uses for its industtry Art 226 of the Constitution of India is not for interfering with steps which protect the environment and the ecology

13 This writ petition is misconceived and is dismissed

Petition dismissed

1991 ALL L J 731

D S SINHA, J

Aqil Ahmad, Petitioner v The Prescribed Authority, Amroha, Moradabad and another, Respondents

C M W No 14126 of 1991, D/-2-5-1991

U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Ss 28, 21 — Application by tenant under S 28 for direction to landlord to carry out repairs — Subsequent application for eviction by landlord — Cannot be stayed by invoking S 10 of Civil P C

Civil P C (1908), S 10

Where an application was filed by the tenant under S 28 of the Act for direction that the landlord should carry out certain major repairs or in the alternative the tenant himself be permitted to carry out the repairs, the subsequent application for eviction filed by the landlord under S 21 of the Act could not be stayed by invoking S 10 of the Civil P C S 10 of the Code has not been made expressly applicable to the proceedings under the Act Even if the principles contained in S 10 of the Code are invoked in the proceedings under the Act, the proceedings, giving rise to the instant petition are not liable to be stayed for the simple reason that in both the proceedings one instituted by the tenant and the other instituted by the landlord the parties are unanimous on the question of the bad condition of the shop In both the proceedings, the parties admit that the condition of the shop is such that it is either required to be demolished or called for major repairs In this view of the matter, it cannot be said that issue involved in the two proceedings is identical Apart from this the reliefs in the two proceedings are also different (Para 7)

Khalil Ahmad Ansari, for Petitioner Standing Counsel, for Respondents

ORDER — Heard K A Ansari, learned counsel for the petitioner

2 In the disputed shop bearing Municipal No 635 (West facing) situate in Mohalla Danish-Mandan Amroha, district Moradabad, of which Sri Shandar Hasan Khan, the respondent No 2, is landlord, the petitioner is a tenant at the monthly rent of Rs 48/-

On 11th July 1990 before the Prescribed Authority, Amroha, District Moradabad (Munsif, Amroha), the petitioner moved an application under sub-section (4) of S 28 of the U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 hereinafter called the (Act) praying that the landlord of the disputed shop may be required to carry out certain major repairs or, in the alternative, the petitioner hismself be permitted to carry out the repairs The said application was numbered as case No 328 of 1990 and is still pending consideration before the Prescribed Authority, the respondent No. 1.

3. On 7th August, 1990 the respondent No. 2 Shamdar Hasan Khan, instituted an application under S. 21(1)(a) of the Act seeking eviction of the petitioner from the disputed shop. This application is registered as Case No. 14 of 1990 and is pending consideration before the Prescribed Authority, the respondent No. 1.

4. In case No. 14 of 1990 under S. 21(1)(a) of the Act pending before the Prescribed Authority the respondent No. 1, the petitioner moved an application under S. 27C praying for stay of the proceedings of the case till the disposal of the proceedings, emanating from the application moved by him, under S. 28 of the Act on the ground that issue in both the proceedings is identical and as such the instant proceedings which were instituted later in point of time should be stayed under S. 10 of the Code of Civil Procedure, 1908 hereinafter called the Code. This application of the petitioner was resisted by the respondent No. 2 on the ground that S. 10 of the Code did not apply to the proceedings under the Act. It was further pleaded on behalf of the said respondent that the issue involved in two proceedings was not common.

5. Respondent No. 1 after hearing the parties and investigating their respective claims came to the conclusion that the proceedings under S. 21 of the Act, instituted by the respondent No. 2, were not liable to be stayed under S. 10 of the Code in as much as the scope of the proceedings and the relief claimed therein were different. Respondent No. 1, therefore by means of his order dated 21st March, 1991, rejected the application of the petitioner for stay of the proceedings in Case No. 14 of 1990. It is this order which is under challenge in this writ petition.

6. Learned counsel for the petitioner contends before this Court that the respondent No. 1 committed a manifest error of law in coming to the conclusion that proceedings under S. 21 instituted by the respondent No. 2 were not liable to be stayed under S. 10 of the Code in as much as S. 10 of the Code mandates the stay of proceedings instituted later in point of time if the proceedings involve adjudication of issues which are also involved in proceedings instituted earlier, between the same parties. Learned counsel for the petitioner points out that respondent No. 1 was clearly wrong in coming to the conclusion that issues and reliefs involved in two proceedings were different.

7. The contention of the learned counsel is misconceived. S. 10 of the Code has not been made expressly applicable to the proceedings under the Act. Even if the principles contained in S. 10 of the Code are invoked in the proceedings under the Act, the proceedings giving rise to the instant petition, are not liable to be stayed for the simple reason that in both the proceedings one instituted by the petitioner and the other instituted by the respondent No. 2 the parties are unanimous on the question of the bad condition of the shop. In both the proceedings the parties admit that the condition of the shop is such that it is either required to be demolished or calls for major repairs. In this view of the matter it cannot be said that issue involved in the two proceedings is identical. Apart from this as noticed by the respondent No. 1, the reliefs in the two proceedings are also different.

8. The foregoing discussion leads to an irresistible conclusion that respondent No. 1 was perfectly justified in declining to stay the proceedings under S. 21 of the Act against the petitioner and reject his application for stay by means of the impugned order.

9. However, Sri Ansari learned counsel for the petitioner, urges this court to direct the Prescribed Authority to decide the application of the petitioner under S. 28 of the Act before deciding the application of the respondent No. 2, under S. 21 of the Act, or in any event, decide the application of the petitioner expeditiously. For this purpose the petitioner may approach the Prescribed Authority itself and this Court trusts that if the petitioner approaches the Prescribed Authority, the Prescribed Authority will dis

pose of the prayer of the petitioner on merits and in accordance with law

10 Subject to the observations made above the petition is dismissed summarily

11 A certified copy of this order may be issued to the learned counsel for the petitioner within a week on payment of usual charges

Petition dismissed

1991 ALL L J 733

Dr R R MISRA, J

U P Sunni Central Board of Waqfs and another Applicants v Abdul Rasheed and others, Opposite Parties

Civil Revn No 318 of 1991 (Fresh), D/-23-4-1991 *

U P Muslim Waqfs Act (1960), S 76 Proviso and S 71 — Revision Order passed by Tribunal during pendency of dispute under S 71 — Not final award — Hence revision not maintainable under S 76 — Tribunal not being subordinate to High Court no revision lies either under S 115 of Civil P C

1970 All LJ 815 and AIR 1963 All 537, Foll

Civil P C (1908), S 115 (Para 2)

Cases Referred	Chronological Paras
1970 All LJ 815 (Foll)	2
AIR 1963 All 537 (Foll)	2

Shahind Masud, for Applicants

ORDER — This is a purported revision under the proviso to S 76 of the U P Muslim Waqfs Act 1960 filed by the opposite parties It is admitted by the defendants-applicants that the plaintiffs -opposite parties were office bearers of the Managing Committee appointed by Sunni Central Board, the defendant The said Managing Committee of the plaintiffs has been removed and superseded by another Committee by an order dated 3-10-1986 The plaintiffs challenged the said order before the Tribunal by way of a reference under S 71 of the said U P Muslim Waqfs Act 1960 The said reference was numbered as Suit No 1351 of 1986 The ground of challenge taken by the opposite parties-plaintiffs was that there was a party-bandi in the community of Loharan Mohalla Kotla Meerut and as a result of the same some false complaints were made and the Waqf Board had wrongly removed the Committee of the plaintiffs Admittedly the said reference for adjudication is still pending before the Tribunal i e Civil Judge Meerut Meanwhile during the pendency of the said reference before the Tribunal the Waqf Board took the management of the Waqf under the direct management on 7-1-1991 and appointed Sri Islamuddin as its Administrator Be that it may be but before the Tribunal the opposite parties moved an application for ad interim injunction against the said order of supersession dated 3-10 1986 This application was, however, dismissed on 5-10-1990 Thereupon the opposite parties applied for the recall of the said order dated 5-10-1990 which has now been allowed by the Tribunal i e the Civil Judge, by its impugned order dated 26-3-1991 It is against this interim order that the present revision has been filed by the applicants-Board along with Sri Islamuddin, the so-called Administrator

2 I have heard learned counsel for the applicants-Waqf Board Admittedly the dispute referred to under S 71 of the U P Muslim Waqfs Act has not yet been decided by the Tribunal in the shapes of an award Therefore, since no award has been made so far and only an application for recall of the order dated 5-10-1990 has been allowed by the Tribunal and a date has been fixed in the impugned order itself for disposal of the reference which may culminate into an award, in my opinion the said impugned order passed by the Tribunal on the application moved by the opposite parties being not a final award no revision lies from such a decision under the proviso to S 76 of the U P Muslim Waqfs Act 1960, nor would a revision lies under S 115 of the C P C as the Tribunal is not a Court subordinate to High Court In taking this view I am supported by a decision of a Bench of this Court in the case of Naqshe Ali v U P Sunni Central Waqf Board 1970 All LJ 815 In that case for taking the said view the Court had placed reliance on a Division Bench of this Court in the case of Sunni Central Board of Waqf U P v Sirajul Haq Khan AIR 1963 All 537 wherein it was observed that the order passed by the Tribunal during the pendency of the reference before it, would not be an award and would not attract the revisional jurisdiction of the High Court In this view of the matter, to my mind this revision is not maintainable

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*Against order of Civil Judge, Meerut in Ref No 1351 of 1986, D/- 26-3-1991

3 In the result, the revision fails and is dismissed summarily as not maintainable

Petition dismissed

1991 ALL L J 734

S K DHAON AND
S K MOOKERJEE, JJ

Satya Prakash, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn No 8903 of 1991, D/- 19-3-1991

Essential Commodities Act (10 of 1955), Ss 3, 7 — U P High Speed Diesel Oil and Light Diesel Oil Maintenance of Supplies and Distribution) Order, 1981, Cl 8, 1st Proviso — Suspension of licence — Opportunity of hearing — Exception to — Suspension pursuant to information regarding irregularities by licensee — Exception to first proviso not attracted — Opportunity of hearing cannot be eliminated

Natural Justice — Suspension of licence —Opportunity of hearing is imperative

Licence — Suspension of — Opportunity of hearing is imperative

Constitution of India, Art 226

(Paras 3, 5)

Rajiv Gupta, for Petitioner, Standing Counsel, for Respondents

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FI/GI/A683/91/HK/VVG

ORDER — The order dated 4th March, 1991, passed by the District Supply Officer, Bareilly suspending the licence held by the petitioner as a retail dealer under the U P High Speed Diesel Oil and Light Diesel Oil (Maintenance of Supplies and Distribution) Order, 1981 (hereinafter referred to be as the Order) is being impugned in the present writ petition

2 The only reason given for passing the impugned order is that upon an information received on 21st February, 1991, by the Sub-Divisional Officer, Meerganj, a raid was conducted at the business premises of the petitioner and certain irregularities were found A first information report had been lodged alleging therein that the petitioner was liable to be prosecuted under Sections 3/7 of the Essential Commodities Act 1955

3 In paragraph 6 of the petition it has been averred on personal knowledge that the District Supply Officer passed the impugned order without giving any opportunity of a hearing to the petitioner These averments are substantially corroborated by a bare reading of the impugned order The first proviso to Clause 8 of the Order provides that the licencee shall be given a reasonable opportunity of submitting his explanation before his licence is suspended otherwise than by way of suspension pending enquiry Apparently the enquiry contemplated in the proviso is an enquiry under the Order and not an investigation on the basis of the first information report Therefore, the exception carved out in the proviso will not be applicable It follows that it was imperative upon the District Supply Officer to have afforded an opportunity to the petitioner of giving his explanation This defect is fatal

4 We have not considered it necessary to call for a counter-affidavit as we are satisfied that the impugned order was passed without affording any opportunity to the petitioner to explain his case We are, therefore, disposing of this petition finally

5 The impugned order is quashed However, we make it clear that the Licensing Authority will be at liberty to pass a fresh

order in accordance with law and after due application of mind

6 A certified copy of this order may be given to the learned counsel for the petitioner on payment of usual charges within ten days

Order accordingly

1991 ALL L J 735

H C MITAL, J

Ram Pal Singh, Applicant v Zafar Ahmad Opposite Party

Civil Revn No 238 of 1980 D/- 5-3-1991

Civil P C (1908), O 6, R 17, S 115 — Amendment of plaint — Suit for eviction — Title and relationship of landlord and tenant admitted by tenant — Amendment sought by him in written statement to resile from earlier admissions — Rejected by trial Court — Prima facie no error in exercise of jurisdiction by trial Court — High Court would not interfere in revision

In a suit for recovery of arrears of rent and eviction, the tenant had specifically admitted the title of plaintiff and relationship of landlord and tenant and shown his willingness to pay the rent to the plaintiff His application for amendment of written statement sought to resile from earlier admission and to deny title of the plaintiff landlord was rejected by trial Court as it was not found necessary for effectively adjudicating upon the dispute

Held, that prima facie there has been no error in exercise of the jurisdiction by the trial Court and the impugned order does not call for interference in revision

AIR 1983 SC 462 Foll (Paras 6, 7)

Cases Referred Chronological	Paras
AIR 1983 SC 462 (Foll)	3, 6
AIR 1978 SC 484	4

Ravi Kant, for Applicant

DI/GI/A515/91/MPP

ORDER — This revision has been preferred against the order dated 6-2-90 passed by Sri A L Verma, Additional District Judge Roorkee rejecting the applicant s application for amendment of the written statement in S C C Suit No 54 of 1988 for possession and recovery of arrears of rent Through the amendment application the defendant-applicant sought to take the plea that the accommodation in question belonged to the father of the plaintiff and after his death it had devolved on his legal heirs and that the plaintiff alone was not landlord nor entitled to a decree for eviction against the defendant

2 In the impugned order the learned court below has specifically stated that the suit was filed by the plaintiff as there has been default in payment of rent with the specific allegation that the plaintiff was landlord and defendant was his tenant In his written statement the defendant-application has admitted that grandfather of the plaintiff was the owner from whom he had taken it on rent and after his death the father of the plaintiff became the owner who continued to realise rent and he further specifically admitted that in the month of December 1985 plaintiff's father told him that plaintiff was the owner and he further specifically admitted that he was always ready and willing to pay the rent to the plaintiff Thus the defendant did not deny the relationship of landlord and tenant between the plaintiff and himself In that view of the specific admission in the written statement, the defendant through amendment application sought to resile from the earlier admission and deny the plaintiff's title as landlord and, therefore, he rejected the amendment application

3 Sri Ravi Kant learned counsel for the revisionist has urged that a party can be permitted through an amendment application to withdraw its admission and reliance has been placed on an observation of their Lordships of the Supreme Court in the case of Panchdeo Narain Srivastava v Km Jyoti Sahay, AIR 1983 SC 462 In that case the plaintiff had filed a title suit for declaration that he was entitled to withdraw a certain amount deposited by the second defendant in

the court. The plaintiff had described himself as the son of uterine brother of Rama Shanker Prasad. Subsequently the plaintiff moved an application for amendment of the plaint, inter alia, seeking deletion of the word 'Uterine' from the plaint. The trial court granted the application for amendment. The respondents preferred a Civil Revision in the High Court of Judicature at Patna and the Hon'ble Judge of the High Court allowed the revision observing as under:

"I, however, feel satisfied at least to this extent that in view of the legal position this word 'Uterine' has got a significance and may work in favour of either side to a very great extent. In this context therefore as it would amount to change the basis of the claim I am of the view that the amendment should not have been allowed."

4. Their Lordships of the Hon'ble Supreme Court referred to an earlier decision of the Supreme Court in the case of Ganesh Trading Co. v. Moji Ram, (1978) SCR 614 (AIR 1978 SC 484) wherein after a review of number of decisions Hon. Beg, C.J. observed that procedural law is intended to facilitate and not to obstruct the Court of substantive justice. Their Lordships also rejected the contention of the counsel for the respondents that by the device of amendment a very important admission was being withdrawn. Thereupon their Lordships of the Supreme Court observed:—

"An admission made by a party may be withdrawn or may be explained away. Therefore, it cannot be said that by amending an admission of fact cannot be withdrawn. The learned trial Judge granting the application for amendment was satisfied that in order to effectively adjudicate upon the dispute between the parties, amendment of the pleading was necessary. The High Court in its revisional jurisdiction for a reason which is untenable ought not to have interfered with the order made by the trial Court. The learned counsel for the respondents in this connection read one unreported decision of this Court in which this Court upheld the decision of the High Court setting aside the order granting amendment in exercise of its revisional jurisdiction. We have gone through the judgment. The decision does not lay down any particular principle of law and appears to be a decision on its own facts. And ordinarily it is well settled that unless there was an error in exercise of jurisdiction by the Trial Court, the High Court would not interfere with the order in exercise of its revisional jurisdiction.

Viewed from this angle we find no justification for the High Court interfering with the order made by the learned trial Court granting the application for amendment to the plaint. We accordingly allow this appeal and set aside the judgment of the High Court and restore the order of the learned trial Judge."

5. From the above it is clear that their Lordships of the Supreme Court allowed the appeal mainly on the ground that the High Court of Judicature at Patna had wrongly interfered in allowing the revision with the order of the trial Court even though there was no error of exercise of the jurisdiction by the trial court. That apart their Lordships were also of the view that the learned trial Judge granting application for amendment was satisfied that in order to effectively adjudicate upon the dispute between the parties, amendment of the pleading was necessary.

6. In the present case it is already on record that the property originally belonged to the grandfather of the plaintiff. Then it came to the plaintiff's father who continued to realise rent, and thereafter at the behest of the plaintiff's father the defendant was told that the plaintiff was owner and he should pay rent to him and the defendant thereafter was ready and willing to pay rent to the plaintiff. Under the circumstances of the case the amendment sought that the plaintiff alone was not the landlord and entitled to a decree for ejectment was not necessary for effectively adjudicating upon the dispute between the parties. The dispute was only regarding relationship of the landlord and tenant and when admittedly the defendant had admitted the plaintiff to be his landlord and was ready and willing to pay rent, he cannot be permit

ted to blow hot and cold in the same breath and now turn round and allege that the plaintiff alone is not entitled to the decree in question That apart as observed by their Lordships of the Hon'ble Supreme Court in the case of Panchadeo Narain Srivastava (AIR 1983 SC 462) (supra) the law is well settled that unless there is error in exercise of jurisdiction by the trial court the High Court would not interfere with the order in exercise of its revisional jurisdiction

7 The conclusion therefore is that Prima facie the impugned order does not call for any interference in this revision as prima-facie there has not been any error in exercise of the jurisdiction by the trial court The revision is thus dismissed in limine

Revision dismissed

1991 ALL L J 737

B L YADAV J

Pannalal Petitioner v Deputy Director Consolidation Varanasi and others Respondents

Writ Petn No 3530 of 1990 D/- 3-1-1991

U P Consolidation of Holdings Act (5 of 1954) S 20(2) — Consolidation proceedings — Objection filed under S 20(2) — Delay — Condonation of — Ground of wrong legal advice — Is sufficient ground for condonation of delay under S 5 of Limitation Act

Limitation Act (1963), S 5

During consolidation operation a lenient view may be taken in the matters pertaining to the condonation of delay and the expression sufficient cause has to be considered in a liberal manner so as to advance substantial justice Where the notice under S 20(1) could not be served on petitioner tenure holder as he was out of station and thereafter he was given wrong advice of filing an appeal instead of preferring objection under S 20(2) the delay in filing the objection can be condoned by taking a lenient view

Case law discussed (Paras 3 7)

Cases Referred	Chronological	Paras
AIR 1987 SC 1353	1987 Rev Dec 416	2 3
1981 All LJ 1057	1982 Rev Dec 109	2 4 6
AIR 1972 SC 749		6
AIR 1954 SC 411		6
AIR 1937 PC 276		7

Kailash Nath Tripathi for Petitioner Standing Counsel for Respondents

ORDER — By the present petition under Article 226 of the Constitution of India the order dated 24-9-90 passed by the Deputy Director of Consolidation in revision under Section 48 of the Consolidation of Holdings Act (for short the Act) condoning the delay in filing the objection under Section 20 of the Act by the respondent is sought to be quashed

2 Learned counsel for the petitioner urged that the Consolidation Officer has rejected the application of the petitioner under Section 5 of the Limitation Act for condonation of delay in filing the objection under Section 20 of the Act by order dated 10-5-90 and against that order a revision was filed In that even though an observation was made that there was no justification to interfere in the reasons assigned by the Consolidation Officer for condonation of delay which requires interference, but the delay has been condoned by stating some more facts inter alia that during consolidation operations fresh rights are created and the tenure holders are deprived of their original holdings Reliance was placed on Collector v Mst Katiji 1987 Rev Dec 416 (AIR 1987 SC 1353) where the delay was condoned with the observation that a lenient view should be taken in considering the expression sufficient cause' Ram Charan v Dy Director of Consolidation 1982 Rev Dec 109 (1981 All LJ 1057) was also referred

3 The material aspect is that the petitioner's affidavit for condonation of delay has been filed where he has made grievances about the allotment of chak and as he was in service consequently he could not know the progress during consolidation operations and he filed appeal when he came to know about

the distribution of CH form 23 and he was advised on 29-8-88 by his counsel that he must have filed objection under Section 20 He has filed objection on this advice and is making the application for condonation of delay The main ground taken in the affidavit was that on account of insufficient legal advice he could not file objection earlier This ground was not relied upon by the consolidation officer while rejecting the application under Section 5 of the Limitation Act Even though insufficient legal advice by the counsel does consitute a ground for condonation of delay, but the same was not accepted by the Consolidation Officer One additional ground, however, has been given by the Deputy Director of Consolidation that during consolidation operation a lenient view may be taken in the matters pertaining to the condonation of delay and the expression 'sufficient cause' has to be considered in a liberal manner so as to advance substantial justice Similar view has been taken in 1987 Rev Dec 416 (AIR 1987 SC 1353)

4 In Ram Charan v D D C (supra) the following observations on page 112 (of 1982 Rev Dec 109) (at p 1059 of 1981 All LJ 1057) may be noticed

"I, therefore find substance in the argument of the learned counsel for the petitioners, and I am of the opinion that since the earlier objections filed by the petitioners was rejected by the Consolidation Officer on the aforesaid technical ground instead of deciding it on merits after calling report on it from the Assistant Consolidation Officer to meet the technical objection in the manner or alternatively returning it to the petitioners for presentation before the Assistant Consolidation Officer, it would be quite just and proper that the delay be condoned and the petitioners, who had bona fide filed their objection before the Consolidation Officer on legal advice, be permitted to get their claim in respect of land in dispute determined on merits by condoning the delay in filing the objection under Section 5 of the Limitation Act "

5 I am in respectful and complete agreement with the observations made in the aforesaid cases

6 In Ram Charan v D D C (1981 All L J 1057) (supra) the decision of the Supreme Court in AIR 1954 SC 411 was referred In that case it was observed that the expression 'sufficient cause' should be given liberal construction so as to advance substantial Justice In State of West Bengal v Administrator Howrah Municipality AIR 1972 SC 749, it was observed that where a party has acted in a particular manner under the wrong advice given by his advisor he could not be held to be guilty of negligence so as to disentitle the party to get benefit of the expression 'sufficient cause' under Section 5 of the Limitation Act

7 In Kunwar Rajendra Bahadur v Raj Rajeshwar Beli AIR 1937 PC 276, it was held that if a party has acted in a particular manner on a wrong advice given by his legal advisor, he cannot be held guilty of negligence so as to disentitle the party to plead sufficent cause under Section 5 In the present case also insufficient legal advice by the counsel was also taken a ground but that ground was rejected by the consolidation officer and the same has been accepted by the Deputy Director of Consolidation In revision a fresh ground has been taken that during the consolidation operation records are finally prepared Consequently by taking a different view the delay in filing the revision has been condoned Even if some sufficent ground like the one taken by the Deputy Director of Consolidation was taken into account, that cannot be said to be irrelevant consideration Even though the Deputy Director of Consolidation has taken note of this fact that final records are prepared consolidation proceedings are statutorily imposed litigation, this aspect cannot be said to be irrelevant In case parties prefer litigation on their own volition and not on the basis of State compulsion then the consideration on their part may take different shape But where the litigation is statutorily and compuslorily imposed, in that case the particular party might not have been dragged in litigation, but for the State action or administrative decision Under Section 20(1) the relevant extract from the provisional

consolidation scheme were issued and served on the tenure holders But as the petitioner was in service outside hence notices could not be served on him He was further given wrong advice of filing an appeal instead of preferring an objection under Section 20(2) Under these circumstances as the petitioner was given a wrong advice and also the litigation was not voluntary rather State imposed a compulsory litigation The rights were going to be finally decided The tenure holder would be deprived of original plots The ends of justice would be met if a lenient view is taken and delay in filing the objection is condoned The Dy Director of Consolidation did not commit any mistake in condoning the delay

8 In view of the premises aforesaid, the petition is devoid of merits and the same is dismissed summarily

Petition dismissed

1991 ALL L J 739

RAVI S DHAVAN, J

Nirdosh Chaturvedi, Applicant v The High Court of Judicature at Allahabad Respondent

Contempt Case No 466 of 1991 D/- 28-3-1991

Contempt of Courts Act (70 of 1971), S 2(c) — Interference with administration of justice — Vacancy in court — Process for appointment of Munsif initiated by High Court — Meanwhile, members of Bar Association locking up court — Notice of motion seeking explanation for said locking up — Statement on behalf of members of Bar Association that locking up was not deliberate or premeditatedly planned — Unqualified apology tendered — Notice liable to be discharged

Constitution of India, Arts 215, 226

(Para 20)

Cases Referred Chronological		Paras
AIR 1974 SC 710	1974 Cri LJ 631	17
AIR 1954 SC 10	1954 Cri LJ 238	18

EI/GI/A569/91/HK/VNP

ORDER — An outlying court within the judgeship of Bareilly Tahsil Aonla became vacant when its Presiding Officer was promoted and posted as an Additional Civil Judge, Gorakhpur on 7-2-1991 Two days before this the registry of the High Court already started processing the matter relating to the appointment of a Presiding Officer at this court

2 While this matter was in progress a letter was received from the Association Aonla through its President Patron and General Secretary drawing the attention of the High Court to the vacant court The letter was received on 27-2-1991 It was placed before the Administrative Judge on the same day On this the Administrative Judge made the following endorsement —

Registrar

Kindly take a notice of the void at the Munsif's court Aonla and place your suggestions during the week of 4 March

Sd R S D
27-2-1991

3 The search for a successor for this court is on In the meantime the District Judge, Bareilly, by a letter of 15-3-1991 intimated the Registrar High Court, that the members of the Bar Association, Aonla, have struck work and have locked up the Munsif's court since 13-3-1991 to press their demand for a Munsif's posting at Aonla

4 The General Secretary of the Bar Association met the Registrar, High Court yesterday to present a representation of the Bar Association and seek a meeting with the Administrative Judge The Registrar High Court, on the representation of Bar Association made the following endorsement

'Hon'ble A J —5

A delegation of Bareilly Bar has come to meet your Lordship in this connection The District Judge, Bareilly vide letter dated 15-3-91 has also informed that members of the Bar Association, Aonla have locked the court rooms at Aonla

Submitted

Sd A S Tripathi
Registrar
27-3-91

5 On this the Registrar was intimated that the Administrative Judge is discussing this very matter with the Additional Registrar, and that the delegation may meet the Administrative Judge on 28 March 1991 the next day at 10 a m

6 It may be set on record that after the court rose for the day yesterday the Additional Registrar had a meeting with the Administrative Judge and was to draw out a list of judicial officers whose tenure is ripe for being transferred so that one of them may be posted to man the Munsif's court at Bareilly

7 Locking a court is interference with and obstructing the course of public justice

8 The General Secretary of the Bar Association was given the appointment sought with the Administrative Judge today at 10 a m in chambers Nothing was kept away from him and the entire record in the matter relating to the process of finding an incumbent to the Munsif's court at Aonla was placed before him with the Additional Registrar, High Court present The General Secretary of the Bar Association was satisfied that the High Court was equally concerned that the void at the Munsif's court without a presiding officer be filled and, in fact, even before the Bar Association concerned itself about this matter

9 The Bar Association taking upon itself to lock the doors of the Munsif's court at Aonla, Bareilly, the Administrative Judge, told the General Secretary, was obstructing the administration of justice The High Court, under Article 215 of the Constitution of India was a court of record Being told by the District Judge, Bareilly that the Bar Association has locked the courts and the Bar Association itself announcing that it has done it is precipitation on record of a Court of Record that the administration of justice has been obstructed This is contempt, and everyday the situation continues it is contemptuous The General Secretary of the Bar Association Aonla, Bareilly, Mr Nirdosh Chaturvedi Advocate was put under notice to give his or his Associations explanation in arranging to seal the court of Munsif Aonla The explanation on a notice of motion by the Administrative Judge was to be given in court as the situation now was a matter arising out of a contemptuous situation, and consequently a judicial proceeding

10 In Court at the Bar the General Secretary of the Bar Association Aonla Mr Nirdosh Chaturvedi, was given the opportunity to address the court on his explanation, and was provided with aid of counsel Mr Navin Sinha Advocate at the suggestion of the Court volunteered to assist Mr Nirdosh Chaturvedi

11 The High Court's concern was indicated to the General Secretary Bar Association

12 Putting locks on the court and telling the High Court that a Presiding Officer be sent to sit in court is theatricalism It is threat to the High Court No judicial officer can go to lock court This threat carried out will be a bad precedent in impairing the independence of the judicial officer If a Presiding Officer can be locked within and out this may also impair the quality, rationality and the independence of his judicial decision making in an atmosphere of threat, blackmail and belligerence This may set another vicious circle Today the lawyers have locked their only court to welcome an incoming judge to a sealed court Tomorrow, a Munsif may decline to go to it Will the lawyers' strike and bolt the doors and lock the court again? And, who will resolve such issues? The concept of outlying courts at the tahsil level, if such situations continue to happen, may have to be abandoned

13 These are peoples courts, not for the lawyers or of the judges But, of a republic to resolve disputes between people and to arrange for the acceptability of decisions as part of an organised public justice system, an

organ of the State known as the judicature Bringing working institutions meant to function, under the Constitution to a grinding halt is not liberty nor freedom, it is anarchy A court may be brought to close today for one pretext or another, but its functional utility is put into a coma Then a word of caution A Judge s writ, will not rule and lawyers must not expect it too Waiting and watching behind the curtains are forces there always have and will be, which want institutions like the judiciary and the legislatures not to function These are the infections which take over when the institutional fabric is weak These are force which do not suffer democracy and the rule of law The judicial system is the first

(Contd on Col 2)

victim No liberty is secure without a court to uphold forces it and an apprehension always lurks today that those who rule may have taken powers which at any moment could be turned into naked government by Decree [1]

14 The aspect of closing courts is already a phenomenal disease It has spread from the door step courts to apex It has bred a holiday syndrome in lawyers court staff and judges, alike The proposition is resisted but a reality This is in short with many matters yet not mentioned are the ills and ugly aspects of the reality in locking up the peoples courts In the district of Bareilly alone, the working days lost by strike in the last five years were

Years	Gazetted Holidays/ Vacations	Court remained closed due to unusual features	Working days
1986	107	44	214
1987	111	33	221
1988	114	59	193
1989	114	75	176
1990	114	44	207

15 The position at the Allahabad High Court was thus

Year	Total No of strike days by Advocates	Total No of strike days by employees	Total No of days due to tal demise	Holidays demanded by Bar/staff in lieu of assurance to work on other day but assurance not kept	Total	Holidays vacations	Total No of actual working days during the year	Total No of normal working days during the year	Total No of days when Courts were in session
1986	37	17	2	2	58	157	208	210	152
1987	7	18	3	--	28	155	210	210	182
1988	13	3	5½	2	23½	158	208	210	186½
1989	46	17	11	3	77	158	207	210	133
1990	24	—	9	2	25	158	207	210	175

16 Keeping the courts functioning, as opposed to having them closed by being locked, is the control a court exercises through 'the Judge as a Judge in the course of judicial administration Judicial administration is an integral function of the Judge and cannot suffer any dissection so far as maintenance of high standards of rectitude in judicial administration is concerned The whole set up of a court is for the purpose of administration of justice, and the control which the judge exercises over his assistants has also the object of maintaining the purity of administration of justice These observations apply to all courts of justice in the land whether they are regarded as superior or inferior courts of justice "

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[1] C K Allen, in the foreword to Mrs Margnerite A Sieghart LL B Dr JUR Government by Decree—Stevens and Sons Limited, London 1950

17 " Courts of justice have, in accordance with their constitution, to perform multifarious functions for due administration of justice Any lapse from the strict standards of rectitude in performing these functions is bound to affect administration of justice which is a term of wider import than mere adjudication of causes from the seat of justice "[2]

18 The court then explained to the General Secretary of the Bar Association Aonla, that in the matter of expressing concern on obstructing the administration of justice, the Supreme Court has made observations more than three decades ago that "It cannot be disputed that in regard to matters of contempt, the members of a Bar Association do not occupy any privileged or higher position than ordinary citizens "[3]

19 Mr Navin Sinha, Advocate, assisting Mr Nirdosh Chaturvedi, General Secretary, Bar Association, Aonla made a request to adjourn the matter for some time so that he could explain the perspective to the General Secretary Mr Nirdosh Chaturvedi on what he has to explain to the court in the context of Article 215 of the Constitution of India The indulgence was granted

20 On recall when the matter was taken up again, Mr Navin Sinha, Advocate, submitted that he had explained to the General Secretary, Aonla Bar Association that putting locks on the doors of the Munsif's court cannot be justified under any circumstances Mr Navin Sinha, Advocate, assisting the General Secretary, under notice, submitted that after he had discussion with the General Secretary, he was given to understand and he was satisfied that Mr Nirdosh Chaturvedi, acting as General Secretary, and the Bar Association at Aonla collectively at the tahsil of Aonla had not consciously, deliberately or premeditatedly planned to obstruct the course of justice or interfere with it The Bar Association in what it did, activated itself more than was necessary to resort to locking the Munsif's court and it had no idea that the matter of transfer and posting an officer was already being processed and that an incumbent was almost being finalised between procedures prescribed Mr Navin Sinha, Advocate in the presence of Mr Nirdosh Chaturvedi at the Bar pleaded that in the circumstances, an unqualified apology, without reservations on behalf of Mr Nirdosh Chaturvedi Advocate and the Tahsil Bar Association, Aonla, be considered Mr Navin Sinha, Advocate, also submitted that he has instructions from Mr Nirdosh Chaturvedi to submit to the court and to assure the High Court that as soon as the General Secretary, Mr Nirdosh Chaturvedi, Advocate, returns to Aonla the locks on the doors of the Munsif's court shall be taken off

21 Mr Navin Sinha, Advocate, took the court's permission to make a suggestion He submitted that should an outlying part become vacant for whatever be the reason, the District Judge, concerned, should step in to make a temporary arrangement until the High Court makes a substantive arrangement The court of the Administrative Judge indicated to Mr Sinha, that subject to the availability of a judicial officer at the district, his suggestion will be conveyed to the Registrar, High Court, to be worked, as a matter of policy within the High Court Rules

22 Let the outlying court at tahsil Aonla, Bareilly be made assessable to the people On the assurance given to the court that it would, this court discharges the notice issued, with appreciation of Mr Navin Sinha, Advocate in guiding the Bar Association, Aonla, to a correct perspective

23 Notice discharged Consign to the record

Order accordingly

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[2] In re, Baradakanta v Registrar Orissa High Court AIR 1974 SC 710

[3] In re, Brahma Prakash v State of U P, AIR 1954 SC 10

1991 ALL L J 743

S K DHAON AND K NARAYAN, JJ

Mahant Govind Puri, Petitioner v State of U P and others Respondents

Civil Misc Writ No 4308 of 1989, D/-4-4-1991

U P Hindu Public Religious Institutions (Prevention of Dissipation of Properties) Act (22 of 1962), S 8(e) proviso — Public Religious Institution — Powers of Commissioner — Order directing District Magistrate to take measures for protection of its properties — Cannot be passed without hearing trustees — Post decisional remedial hearing not a cure

Constitution of India, Art 226

Post-decisional hearing — Not cure — When requirement of giving opportunity of hearing is mandatory

Where an order was passed by the Commissioner directing the District Magistrate to take measures for protection of the properties of the shrine and manage the same without affording an opportunity of being heard before passing such an order as provided by proviso to Section 8(e) of the U P Public Religious Institution (Prevention of Dissipation of Properties) Act (1962), the non-observance of the procedure would render the act or the said order void (Paras 5, 6)

The rules of natural justice can operate only in areas not covered by any law validly made They can supplement the law but cannot supplant it In the proviso to Section 8(e) of the Act, the legislature is emphatic that predecisional hearing is a must A fortiori, a post decisional remedial hearing is completely ruled out (Para 8)

Cases Referred Chronological	Paras
AIR 1987 SC 71 (1986) 4 SCC 537	10
(1971) Ch 34 (1970) 3 WLR 434 (1970) 2 All ER 713, Leary v National Union of Vehicle Builders	10

Sudhanshu Dhulia, for Petitioner, Standing Counsel, for Respondents

S K DHAON, J — The petitioner who claims himself to be the Chief Priest and Mahant of a shrine 'Kamleshwar', on 7th March, 1989, approached this Court with this petition with the prayer that the notice dated 18th August, 1988, issued by the District Magistrate (Investigation Officer) calling upon the petitioner to show cause as to why the gross annual income as shown in Annexure I, II and III of the said communication should not be considered to be final for the purposes of being submitted to the Commissioner may be crashed The further prayer was that a writ in the nature of mandamus may be issued commanding the Commissioner, Garhwal Division and the District Magistrate, Pauri Garhwal from interfering with the work of the petitioner as Mahant/Chief Priest of the said shrine

2 The burden of the song in the writ petition was that in the purported exercise of power under Section 4 of the U P Hindu Public Religious Institutions (Prevention of Dissipation of Properties) Act, 1962 (hereinafter referred to as the Act) the State Government had not appointed any Commissioner and the Commissioner of the Garhwal Division could not act as a Commissioner under the Act without an appointment having been made under S 4 Therefore, the Commissioner, Garhwal Division, acted without jurisdiction in appointing the District Magistrate as the Investigation Officer Consequently, the entire proceedings fell through

3 A counter-affidavit has been filed by Sri Ashwani Kumar Upreti, a Lipik in the Office of the Collector, Pauri Garhwal The material averments in the said affidavit are these The State Government had appointed the Commissioner of the Garhwal Division as the Commissioner The reply given by the petitioner to the aforesaid notice dated 18th August, 1988, was considered and thereafter on 11th October, 1988, a statement was submitted by the Investigation Officer/District Magistrate as contemplated under Section 6(2) of the Act Acting upon the statement, the Commissioner on 4th January, 1989, purported to pass an order under Section 8 whereby he directed the District

Magistrate Pauri Garhwal to take measures for the protection of the properties of the shrine and manage the same

4 Section 8 of the Act, inter alia, provides that a Commissioner shall in respect of any Hindu public religious institution within the area of the jurisdiction and in respect of which proceedings under Section 6 have been directed have the powers to take measures for the protection of property of or under the dominion of the institution including arrangement for the safe custody of jewels and other valuables thereof but not so as to deprive the trustees of the right of administration (Section 8(e)) The proviso to Section 8 is important and may be extracted —

Provided that before passing a final order under clause (d) (e) or (f) the Commissioner shall allow the person concerned a reasonable opportunity of being heard

Admittedly action has been taken by the Commissioner under Section 8(e) Admittedly the District Magistrate under the orders of the Commissioner took possession of the properties of the temple which included jewels valuable Government securities etc It is the respondents' case that these properties are in the custody of the District Magistrate

5 From the averments made in the counter-affidavit it is clear that no opportunity much less a reasonable opportunity of being heard was given to the petitioner before the Commissioner passed the order under Section 8(e) The position is made still clear by categorical averments made in the rejoinder-affidavit that the Commissioner passed the order under Section 8 upon the receipt of the statement of the Investigation Officer under Section 6 This defect in our opinion, is fatal as the mandate given by the Legislature in the proviso to Section 8 has been observed in its clear breach The emphasis in the proviso is that prior hearing is to be given before passing an order The crucial words in the proviso are " before and 'shall" The use of the auxiliary verb 'shall ' in its context and setting manifests the legislative intent that it is imperative to afford an opportunity prior to the passing of an order Again the Legislature has purposely qualified "opportunity" with the preceding word reasonable The avowed object appears to be that a trustee should be afforded a full and fair opportunity to rebut the conclusion of the Investigation Officer

6 The observance of the procedure as indicated in the proviso to Section 8 is mandatory It is trite law that if an action is to be taken or an order has to be passed in a certain manner, the non-observance of the procedure will render the act or the order void

7 Realising that an order under S 8(e) will have a serious consequence upon the rights of a trustee, the Legislature engrafted the procedural safeguard in the proviso Therefore, the non-observance of the procedure will result in a case of procedural ultra vires Any attempt to dilute the rigor of the procedural provision should be eschewed thereby preventing procedural anarchy

8 The rules of natural justice can operate only in areas not covered by any law validly made They can supplement the law but cannot supplant it In the proviso the Legislature is emphatic that predecisional hearing is a must A fortiori, a post decisional remedial hearing is completely ruled out Therefore, we have no hesitation in rejecting the submission of Sri G L Tripathi, the Standing Counsel that the defect can be cured by directing the Commissioner to afford to the petitioner a post decisional remedial hearing

9 Learned standing counsel drew our attention to Section 12 which, inter alia provides that an appeal against an order passed by the Commissioner shall lie to the District Judge He contends that the defect in the order of the Commissioner, in so far as it was passed without affording a prior hearing to the petitioner can be cured if the petitioner prefers an appeal and the appellate authority looks into his grievance We will be repeating ourselves in emphasising that the proviso to Section 8 contains a statutory safeguard and

therein the rule of predecisional hearing is incorporated It is obvious that the right to prevent the passing of an order in the first instance is quite different from a right of appeal against that order In its very nature and scope an original hearing differs substantially from an appeal An appellant cannot as of right lead evidence Further, a person who comes before the appellate authority challenging an order passed to his prejudice is not in the same position as the person against whom an order is sought to be passed in the first instance

10 In Institute of Chartered Accountants of India v L K Ratna (1986) 4 SCC 537 (AIR 1987 SC 71), in paragraph 17 the Supreme Court has quoted with approval a passage from Wade s ' Administrative Law" which says —

> If natural justice is violated at the first stage the right of appeal is not so much a true right of appeal as a corrected initial hearing instead of fair trial followed by appeal the procedure is reduced to unfair trial followed by fair trial '

Again their Lordships quoted with approval the observations of Megrry, J In Leary v National Union of Vehicle Builders, (1971) Ch 34 at page 49

> "If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body this has the result of depriving the member of his right of appeal from the expelling body If the rules and the law combine to give the member the right to a fair trial and the right of appeal why should be be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo the member is being stripped of his right to appeal to another body from the effective decision to expel him I cannot think that the natural justice is satisfied by a process whereby an unfair trial, through not resulting in a valid expulsion will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice As a general rule at all events I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body

11 Learned Standing Counsel next urged that this is not a fit case for interference as the petitioner has not exhausted the statutory remedy of appeal under Section 12 The short answer to this submission is that in view of the admitted position that no attempt was made to afford to the petitioner any opportunity of a hearing, much less a reasonable opportunity, as envisaged in the proviso to Section 8, the impugned order of the Commissioner should be treated to be a nullity and void In such a situation, this petition cannot be thrown out as suggested by the Standing Counsel

12 As already indicated the petitioner was deprived of the valuable properties and the same are in the custody of the District Magistrate These properties are liable to be returned to the petitioner the moment the order passed under Section 8 is quashed

13 Learned Standing Counsel has urged that the properties may remain in the custody of the District Magistrate pending final decision of the Commissioner in proceedings under Section 8 if the impugned order has to be ultimately quashed This is not a correct approach Such a course will result in grave injustice to the petitioner The District Magistrate shall return all the properties of which he had taken custody If the Commissioner chooses to pass a fresh order under Section 8, he shall adjudicate upon the question that he has not been authorised under Section 4 of the Act to act as a Commissioner, that the Investigation Officer was appointed in this case in the year 1981 and he submitted a statement under Section 6 in August, 1988 The matter became stale and, therefore, no action should have been taken in response to the statement submitted by the District Magistrate It goes without saying that the

Commissioner shall pass a speaking order after affording an opportunity of an oral hearing to the petitioner and after giving him an opportunity of filing objections, if he so desires

14 The petition succeeds and is allowed The order dated 4th January, 1989, passed by the Commissioner in proceedings under Section 8 of the Act (Annexure 4 to the counter-affidavit of Ashwani Kumar Upretti) is quashed The Commissioner and the District Magistrate shall act in accordance with the directions given above The petitioner shall be entitled to his costs

Petition allowed

1991 ALL L J 746

(LUCKNOW BENCH)

U C SRIVASTAVA AND R SINGH, JJ

Wing Commander Ramesh Chandra (Retd), Petitioner v State of U P and others, Respondents

W P No 5383 of 1987, D/ 26 3 1990

U P Avas evam Vikas Parishad Adhiniyam (1 of 1986), Ss 28, 29, 32 — Land Acquisition Act (1894), S 26 — Supplementary award — validity — No provision in Land Acquisition Act to pass supplementary award — Even assuming that such award can be given, prior opportunity of hearing to affected person is necessary — Supplementary award passed on back of person whose land is acquired is liable to be quashed

(Para 6)

ORDER — By means of this writ petition the petitioner has prayed for issue of a writ of mandamus commanding the opposite parties, their officials, servants and agents not to demolish any existing constructions over his land in plots No 155 and 156 in village in question in District Hardoi and not to dispossess him from the land in question and not to cut trees or cause damage to his property

2 U P Avas evam Vikas Parishad opposite party issued a notification u/s 28 of U P Avas evam Vikas Parishad Adhiniyam, 1965 (hereinafter referred to as the Adhiniyam) for acquiring 100 acres of land in Nagheta Bhumi Vikas evam Garh Asthan Yojna, Hardoi which was published in U P Gazette and newspapers also In the notification only khasra numbers were mentioned and boundary of the area sought to be acquired Admittedly an area of 2 bigha 16 biswa of khasra No 155 and 2 bigha of khasra No 156 was included in the scheme in respect of which notification referred to above was issued There after various notices were issued u/s 29 of the Adhiniyum to the tenure holders including the petitioner The petitioner submitted his objection even without being served upon the said notice

3 In his objection u/s 30(2) of Adhiniyam after detailing the facts, the petitioner prayed that his objection may be taken note before finalising the scheme and the objections were not without prejudice to claim compensation Plot No 156 has a total area of 1 bigha 17 biswa out of which 4 biswa 10 biswansi falls in non Z A area and rest 1 bigha 12 biswa 10 biswansis falls in Z A area The petitioner claimed to be owner of 8 biswa 11¼ biswansis in non Z A area and 4 biswa in Z A area According to opposite parties 9 biswa 5 biswansi land of plot No 155 was recorded in the name of Bhagwan Deen son of Saligram and the name of petitioner had wrongly been recorded by order dated 24 6 87 which according to opposite party was done after the land vested in Parishad and possession was taken The name of Bhagwan Deen was entered as Sikmi tenant in clause 9 in the Khasra in respect of land of Khasra Nos 155 and 156 which was entered in the name of Vishun Narain and Anteryami but in the khasra his name was shown as Shikmi tenant of petitioner in part II Bhagwan Deen is reported to have died long ago As per allegations of the petitioner these plots are old groves having several trees of fifty years of age and petitioner's name is mentioned over plot No 147 which is adjacent and

contiguous to plots Nos 155 and 156 and the entire land is enclosed by boundary walls The petitioner has placed on record the valuation report of Major R P Goyal, a Government Gazetted Valuer appointed by the Ministry of Finance and the Central Board of Direct Taxes which was given to him in the year 1975 and the petitioner has averred that in the said report prepared by Parishad the existence of boundary wall is mentioned Petitioner has placed on record, the name of various co-sharers of plots Nos 155 and 156 who according to him are in separate possession over their shares This fact has not been denied in the counter affidavit Petitioner s allegation was that area of plot Nos 155 and 156 was never acquired and no notice was ever given to him and plots of other persons were acquired and proceedings went ahead It was only when opposite parties threatened to demolish petitioner s wall and house, he sent a letter to the Special Land Acquisition Officer in February 1985 who vide letter dated 27 7 85 informed him that land of other persons has been acquired and petitioner s land has not been acquired or transferred Copy of said letter has been annexed to the writ petition The award was given on 31 3-85 by Special Land Acquisition Officer and in the award reference to said khasra finds place In the award it is stated that the lands belonging to Bishun Narain and Antaryami have been taken into account which has been acquired and similarly in respect of khasra No 111 in which plot No 156 is included, it has been stated that the land belonging to Saraswati Narain had been acquired

4 Subsequently it appears that a supplementary award was given on 22 9 86 and from that it appears that some part of petitioner s land has also been included in it The total area in the supplementary award has been indicated to be 37 13 6 bigha and according to the petitioner this area would not include his land According to opposite party possession over the land was delivered to Parishad on 7 2 1983 In this supplementary award so far as plot No 155 is concerned, it has been mentioned that in the record name of Vishun Narain etc has been mentioned and Bhagwan Deen in shown as Sikmi and the name of Surendra Mohan also finds place over 12 biswa land possession of which has been taken and compensation in respect of same will be payable So far as plot No 156 is concerned, it has been stated that in respect of 16 biswa of land recorded in the names of Ramesh Chandra Bishun Narain of which Bhagwan Dai is Sikmi tenure holder, compensation will be payable according to law Petitioner made several representations against the same and prayed that in case land is sought to be acquired then compensation is to be paid to him to the tune of Rupees nine lacs and the opposite parties have no right to prepare supplementary award Claiming himself to be inpossession he has filed the instant writ petition

5 In the counter affidavit, it has not been denied that any notice before issuance of notification for acquiring the land or thereafter was sent to the petitioner But it has been stated that notice u/s 29 of the Act were issued to various tenure holders But petitioner s assertion has not been denied that any notice was sent to him It has also not been denied that he filed objections It has been stated that intimation was sent on behalf of the Parishad that Niyojan Samiti will hear objections on 4 8 80 According to the petitioner notice was served on him on 4 8 80 itself at Delhi and as such it was not possible for him to attend the hearing on that date Thereafter petitioner sent a letter to the Parishad on 5 9 83 and prayed that his objection may be taken at Lucknow but that was not done On the recommendation of Niyojan Samiti, it appears a portion of plots Nos 155, 156 and 140 were released In the counter affidavit, it has been pleaded that the land which belongs to the petitioner was acquired and rest vested with the Parishad and petitioner was not in possession of the same as Parishad had taken possession of the same as early as in the year 1983 on 7 3 1983 and 20-9-1986 It has been stated that so far as plot No 155 is concerned, Parishad has acquired 1 1 16 biswa of land and rest has not been acquired as there are old constructions

on the same and so far as plot No 156 is concerned only 18 biswansis land has been acquired So far as the letter which was written by the Special Land Acquisition Officer dated 27 2 86 to the petitioner is concerned by which he was informed that his land has not been acquired and possession has not been delivered to the Parishad it has been stated that there is no such letter on record of the Parishad It has also been stated that Parishad has not demolished any boundary wall which might have been in existence The petitioner s claim to the effect that before giving supplementary award in which his name figures in relation to plot acquired of which compensation was not paid There is no denial of the same and same was passed without giving any opportunity of hearing to him or that any compensation was tendered or paid to him There is no explanation as to how the land of the petitioner which has been shown to have been acquired is measuring 37 13 16 biswansis in supplementary award that is the total area of land acquired seems to be belonging to others recorded with him like Vishun Narain etc whose land has been shown as 37 13 16 biswansis which indicates that petitioner's land was not acquired

6 The land was described by boundary in the relevant notification and it was also mentioned that the map can be seen in the office Map obviously included plots Nos 155 and 156 but the map itself did not indicate as to which particular portion of plots Nos 155 and 156 in which there were other co-sharers, was acquired Before publishing first notification it was not necessary that notice should be given to concerned persons but this much is clear that a special land Acquisition Officer the authority concerned at the spot did intimate the petitioner that so far as his plot is concerned it has not been acquired and the land of other persons has been acquired. Even if there is no denial of this fact, merely because letter is not available, it cannot be said that no such letter was sent by the Special Land Acquisition Officer The letter of Special Land Acquisition Officer was enough to make the petitioner believe that this land has not been acquired By way of caution the petitioner filed an objection without getting any notice from which it cannot be said that he was sure that his land was in fact acquired though the petitioner claimed a particular compensation in case acquisition was made The award which was made did not make any reference to the petitioner by name or that his share of plots No 155 or 156 No enquiry was made as to whether any boundary in fact was in existence over the land or not There is no provision in the Land Acquisition Act for giving supplementary award Even if it can be said that supplementary award can be given the same cannot be given without giving opportunity of hearing to the person affected by it If supplementary award is taken as part of or in continuation of the first award then it was incumbent upon the Special Land Acquisition Officer to give opportunity of hearing to the person concerned Thus the Special Land Acquisition Officer committed a manifest error of law and acted in violation of the prescribed provisions of law and against the principles of natural justice and gave the supplementary award on the back of the petitioner As such the supplementary award in so far as it is against the petitioner cannot be sustained and deserves to be quashed

7 As we are quashing the award it is not necessary to enter into other pleas raised by the petitioner as it would be the duty of the Special Land Acquisition Officer to take evidence and find out as to which portion belongs to which party and whether at the appropriate point of time over the land in dispute any boundary wall exsisted and whether part of the land acquired was appurtenant to his house Obviously in case land belongs to the petitioner a formal order in this behalf will be passed He will also find out whether in fact it has been acquired and compensation paid to the petitioner or not

8 In view of what has been stated above the writ petition is allowed and supplementary award dated 22 9 86 copy of decision has been annexed to writ petition as Annexure 17 is quashed so far it relates to the petitioner

and his land The Special Land Accquisition Officer is directed to proceed with the matter afresh and decide the same after making proper enquiry in respect of questions discussed above in accordance with law after giving opportunity of hearing to the petitioner However there will be no order as to costs

Petition allowed

1991 ALL L J 749
(ALLAHABAD HIGH COURT)
S C VERMA J

Narottam Prasad Petitioner v IInd Additional Dist Judge Mathura and others Respondents

Civil Revision No 1115 of 1987 D/ 2 1 91

Constitution of India, Art 226 — Writ Petition — To be dismissed when no effective relief can be granted

U P Act (13 of 1972), Ss 16(1)(b) and 18

A writ petition is liable to be dismissed when no effective relief can be granted Where in a writ petition challenging the order passed by the District Judge under S 18 of the U P Act (13 of 1972) cancelling the earlier allotment order passed in favour of the petitioner there was no interim order or impediment restraining the Rent Control Authorities from proceeding further in the matter and in the meanwhile the transferee from the former landlord applied for the release of the premises and the Rent Control and Eviction Officer on considering the objections of the petitioner released the premises in favour of the transferee landlord under S 16(1)(b) of the Act and no steps were taken either to challenge that order before the High Court by necessary amendment or no fresh proceedings were initiated in that regard by the petitioner, it could not be held that the order of release was illegal void or without jurisdiction that order having not been challenged on merits in any proceedings and having become final As there was no restrain order during the pendency of the writ petition and as the order of allotment stood cancelled no effective relief could be granted to the petitioner and the writ petition was liable to be dismissed

(Paras 10 11 12)

DI/GL A520/91/GDR

Cases Referred	Chronological Paras
1985 (2) ARC 160	4
1981 UPRCC 330	4
1980 ARC 16	4

G N Sharma Advocate for the Petitioner

ORDER — In this petition the order dated 7 10-1986 under S 18 of the U P Act XIII of 1972 hereinafter referred to as the Act cancelling the allotment order dated 20-6 1979 has been challenged

2 The main controversy in the present case starts after the vacancy in respect of premises No 2206, Dampier Nagar, Mathura was notified in accordance with the directions contained in Writ Petition No 1580 of 1976 dated 17 5 1979 The deemed vacancy was notified inviting applications for allotment on 26 5 1979 The applications for allotment were made by Narottam Prasad the petitioner on 22 5 1979 by Shyam Sunder, respondent No 2 on 26 5 1979 Murari Lal Sharma, Chakhleahwar Singh and on behalf of the District Supply Officer The landlord Sri S C Goswami also filed on application for release on 16-5 1979 The application for release was rejected by order dated 18 6-1979 Thereafter the Rent Control and Eviction Officer, after considering the priority of the applications as also bona fide needs of the applicants issued allotment order on 20-6 1979 in favour of Sri Narottam Prasad, the present petitioner The order rejecting the release application was challenged under S 18 of the Act in Revision No 187 of 1979 by Sri S C Goswami, the order rejecting the allotment application dated 20 6 1979 was challenged by Shyam Sunder in Revision No 186 of 1979 and by Murari Lal Sharma in Revision No 181 of 1979 The order dated 20-6 1979 has been filed as Annexure (1) to the writ petition All these cases were taken up together and were disposed of by a

common judgment by which the Revision of the Landlord was allowed and the order dated 18 6 1979 as also the order dated 20 6 1979 were set aside and the Rent Control and Eviction Officer was directed to first decide the release application of the landlord in accordance with law The order dated 4 2 1981 has been filed as Annexure 2 to the writ petition

3 The petitioner Narottam Prasad filed writ petition No 8161 of 1981 challenging the order dated 4 2 1981 The writ petition was allowed and the order dated 4 2 1981 was set aside and the learned IIIrd Additional District Judge was directed to decide only the revision of respondent No 2 Shyam Sunder Sharma The learned single Judge held

Having heard learned counsel for the petitioner and learned counsel for opposite party there can be no doubt that the revising authority committed manifest error of law in allowing revision filed on behalf of the landlord No doubt the application filed on 3rd February 1976 by landlord does not appear to have been disposed of yet omission on part of the Rent Control and Eviction Officer could not render the allotment order on 20th June 1979 as illegal or bad in law As has been stated above that after filing of release application the Rent Control and Eviction Officer regularised the occupation of Sharma whether he was right in doing so or not, this amounted to disposal of the release application In any case if landlord was aggrieved by the order dt. 3rd February 1976 he could have either gone up before the higher authorities or could have filed writ petition in this Court On the other hand it is Socialist Party (sic) which moved review application and came to this court by way of Writ Petition The conduct of the landlord, therefore, is not such as could justify setting aside of the order of allotment passed after the vacancy was declared by this Court in writ petition Whatever merit might have been in the claim of the landlord but once this court decided that the premises in dispute shall be deemed to be vacant it was not open to revising authority to set aside the order passed by Rent Control and Eviction Officer on the ground that the landlord's application filed on 3rd February 1976 was not disposed of"

4 Thereafter the Revision No 186 of 1979 Shyam Sunder Sharma v Narottam Prasad and others was heard by the IIIrd Additional District Judge who specifically observed that in view of the directions of the Hon'ble High Court the matter of Sri Shyam Sunder Sharma is only to be considered in this Revision The learned Judge was of the view that the Rent Control and Eviction Officer only considered the requirements under R 11, the principle of first come first serve but the Rent Control and Eviction Officer did not consider the respective needs of both the parties The learned Judge further held that in view of the decisions reported in 1980 ARC 16 1981 UPRCC 330 and 1985 (2) ARC 160 merely on priority basis under Rule 11 the allotment should not be passed but the bona fide needs of the applicant should also be considered The learned Judge after considering the needs of both the parties recorded a finding that the need of the applicant Shyam Sunder Sharma was bona fide It was further held that during the pendency of the proceedings some subsequent events have been taken place The applicant Shyam Sunder Sharma brought on record the fact of the purchase of the disputed property by his parents the brother and wife etc by sale deed dated 27 4 1984 The applicant also claimed that they have already taken possession of the building All these facts were not disputed on behalf of the petitioner Narottam Prasad in those proceedings In these circumstances, the Revision on behalf of Shyam Sunder Sharma was allowed and the allotment order dated 20-6 1979 was cancelled by order dated 7 10 1986

5 In the present petition the order dated 7 10 1986 has been challenged before me by Narottam Prasad The learned counsel for the petitioner has contended that after there was deemed vacancy in the disputed

accommodation the petitioner was the first to make the application for allotment It has been alleged that the learned IInd Additional District Judge was not correct in holding that the Rent Control and Eviction Officer did not consider the applications for allotment on merit The findings of fact have been recorded by the Rent Control and Eviction Officer holding that the need of the petitioner was bona fide and that Shyam Sunder Sharma was the real brother of Murari Lal Sharma who was held to be in unauthorised occupation by the Hon'ble High Court The allotment of the premises in favour of Shyam Sunder Sharma would only mean, in other way, to regularise an unauthorised occupant Murari Lal Sharma having failed in his attempt to get his unauthorised occupation regularised has set up Shyam Sunder Sharma to make the claim for allotment on his behalf

6 These findings of fact recorded by the Rent Control and Eviction Officer, according to the learned counsel for the petitioner, could not be set aside in Revision under S 18 of the Act which is in parimateria with Section 115, C P C The learned counsel for the petitioner further contended that the learned Judge has treated that in the event of the premises being acquired by Shyam Sunder Sharma in the capacity of the landlord the need was to be considered as if they are considered in respect of release application under S 16(1) (b) of the Act In the present case the approach of the learned Judge should have been to consider the respective claims of the applicants for the purposes of allotment but instead, he was greatly influenced by the fact that the applicant Shyam Sunder Sharma has now attained the status of landlord, his claim was to be considered with that aspect

7 On the other hand, the learned counsel for the respondent supported the impugned order on the ground that the findings with regard to the bona fide need are in the nature of jurisdictional fact and the Rent Control and Eviction Officer committed manifest error of law in only considering the claim of the petitioner on the basis of priority The learned counsel for the respondent further submitted that after the respondent had purchased the disputed building from its original owner on 27-4 1984 through a registered sale deed, an application for release under S 16(1)(b) of the Act was made on 14-10 1986 The application for release was filed after the passing of the order dated 7 10-1986 by which the allotment order dated 20-6 1979 in favour of the petitioner was cancelled and the proceedings for allotment or release were opened The release application was heard after issuing notice to the petitioner and after affording full opportunity to him of filing objections The release application was allowed by order dated 20 10-1986 It was further stated that the order dated 20-10 1986 was in the knowledge of the petitioner and the same was passed after contest between the parties The order dated 20 10 1986 has not been challenged in any proceeding and the same has become final between the parties The certified copy of the order dated 20 10-1986 was filed along with the counter affidavit which is on record In view of the aforesaid facts the learned counsel for the respondents contended that the premises had been released in their favour and they are in occupation for the last several years and have also rebuilt the house after making huge expenditure

8 Now it has to be first seen as to whether there was any vacancy of the disputed premises and the premises was open for allotment or not In my opinion after the order dated 7 10 1986 was passed cancelling the allotment order dated 20 6 1979 the premises was again made available for the allotment or release No doubt the order dated 7 10 1986 was challenged in the present writ petition but there was no interim order or impediment restraining the Rent Control Authorities from proceeding further in the matter

9 At this stage the transferee from the former landlord applied for the release of the premises on 14-10-1985 The Rent Control and Eviction Officer on receipt of the release application, issued notice to the petitioner inviting objections The petitioner filed his

affidavit and contested the averments made in the release application The Rent Control and Eviction Officer considered the need of the landlord and the other affidavits filed in support of the case of the landlord as also the objections of the petitioner The need of the landlord was found to be bona fide and the premises were released in his favour by order dated 20 10-86 A certified copy of the order dated 20-10 1986 has been filed along with the counter affidavit

10 The petitioner thus had full knowledge of the order dated 20 10-1986 but he did not take any steps to challenge the same up to this date The learned counsel for the petitioner even after this order was filed along with counter affidavit, did not take any steps either to challenge this order before this court by necessary amendment or initiated any fresh proceedings in this regard This inaction of the petitioner only indicates that he was no longer interested in pressing his claim with regard to the disputed premises On the other hand, the respondent No 2 some how manipulated to retain the possession as also to obtain favourable order in his favour

11 Considering the aforesaid facts specially the order of release dated 20 10 1986 under S 16(1)(b) of the Act releasing the premises in favour of the respondent No 2 the contest to the order dated 7 10-1986 has remained only for academic purpose No doubt the aforesaid proceedings by the respondent No 2 have been very cleverly manipulated but as there was no restrain order during the pendency of this writ petition and as the order of allotment stood cancelled, it cannot be held that the order of release dated 20 10 1986 was illegal void or without jurisdiction Moreover this order has not been challenged on merits in any proceedings and has become final

12 For the reasons stated above I am of the opinion that no effective relief can now be granted to the petitioner The petition accordingly fails and is dismissed but there shall be no order as to costs

Petition dismissed

1991 ALL L J 752

N L GANGULY J

Shiv Moorat and others Petitioners v State of U P Respondent

Criminal Misc Appln No 4494 of 1991 D/ 5 4 1991

Criminal P C (2 of 1974), S 439 — Bail application — Powers of High Court — Accused approaching High Court before surrendering to lower appellate Court — High Court need not issue direction in each and every case that application may be entertained on day accused surrender

(Para 2)

Cases Referred Choronological	**Paras**
(1991) Criminal Misc Appln No 4109 of 1991 (All), Ram Sahai v State of U P	2
1989 All LJ 223 1989 Judicial Interpretation on Crimes 207	2
1988 All Cri C 318	2
1988 All Cri R 464	2

Mohd. Shabbir for Petitioners Dy Govt Advocate for Respondents

ORDER — No case is made out for arrest of the applicant in Crime No 73 of 1991 under S 379 I P C P S Cantt District Allahabad

2 The only prayer is that direction be issued that the bail application of the accused applicant may be entertained by the learned Magistrate and the Sessions Judge on the day they surrender I don t consider it necessary to issue such a direction in each and every case of accused applicant who approaches this court before surrendering to the lower appellate court The law for consideration of bail applications and the manner of disposal has been settled by a number of judgments of this Court e g in 1988 All Cri C 318 Babu Ram v State of U P and in 1989 Judicial Interpretation on Crimes pages 207 1989 All LJ 223) Rajendra v State of U P and another The law laid down is published in Cri Misc

EI/FI/A542/91/BNG

Appln No 4109 of 1991 Ram Sahai v State of U P I have also issued directions following the reported cases of this Court the procedure for entertaining the disposal of bail application by the subordinate courts It is for the counsel for the applicant in the courts below to bring to the notice of the court concerned the law laid down by the High Court If the counsel for the applicant bring the relevant case law to the notice of the courts below there is no doubt that the courts below will follow the law in the matter of bail applications

3 With these observations the applications u/s 482 Cr P C is disposed of

Application dismissed

1991 ALL L J 753

S C VERMA J

Jai Ram Gupta, Petitioner v VII Additional District Judge, Kanpur and another Respondents

Civil Misc Writ Petn No 14491 of 1988 D/ 8 1 1991

U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S 21(1)(a) — Release application — It is duty of Court to consider requirement of landlord and tenant though plea not raised

U P Urban Buildings (Regulation of Lettings, Rent and Eviction) Rules 1972, R 16(1)(d)

It is no doubt correct that it was the duty of the Courts to consider the question of the needs of the landlord and tenant as required to be considered under R 16(1)(d) of the Rules even though a plea in this regard has not been taken in the written statement but whenever such a plea is raised before any Court, the matter should be examined on the basis of the material on record This would be necessary because it may be possible that even though this plea is raised but no benefit under the provisions of the Rule could be given In some cases the accommodation may not be such which could be given In some cases the accommodation may not be such which could be apportioned or in some case even if the entire accommodation is released it may not be sufficient to the requirement of the landlord or may be just sufficient

(Para 6)

Cases Referred Chronological	**Paras**
1986 All LJ 796 (1986) 1 All Rent Cas 247	7
1986 All LJ 1043 (1986) 2 All Rent Cas 106 (2)	7
(1986) 1 All Rent Cas 158 1986 UPRJ 43	7
(1985) 1 All Rent Cas 9 1985 All CJ 13	7
(1985) 2 All Rent Cas 219	5
1982 All Rent Cas 305 1982 (UP) RCC 112	5
1980 All Rent Cas 311 1980 (UP) RCC 86 (SC)	5

Rakesh Bahadur for Petitioner Standing Counsel for Respondents

ORDER — The dispute in the present writ petition relates to premises No 127, LIG 2 Black W Kidwai Nagar Kanpur which has been released in favour of the landlord by the impugned orders dated 5 11 1986 and 23 4 1988 passed by the Prescribed authority and the appellate authority VII the Additional District Judge Kanpur respectively

2 The respondent No 3 filed release application under S 21(1)(a) of U P Act XIII of 1972 hereinafter referred to as the Act on the ground that he has retired from Government service on 28 2 1982 and he wants to settle at Kanpur and needs the disputed accommodation for his residence

3 The application was contested by the petitioner tenant and it has been alleged that the respondent No 3 after retirement has settled at Lucknow where he was practising as an Advocate and residing in House No 9 A Rakabganj, Lucknow with his family The wife of respondent No 3 who is an officer in the Education Department has also been allotted a house in Mahanagar locality The sole motive of getting the house released was to sell it for high consideration

4 The Prescribed Authority vide order dated 5-11 1986 held that the need of the

landlord is bona fide and genuine and on comparative hardship it was also found that the landlord will be put to greater hardship The findings of fact recorded by the Prescribed Authority were upheld by the learned VII Additional District Judge Kanpur by judgment dated 23 4 1988

5 In the present case the only point argued before me by the learned counsel for the petitioner Sri S N Verma Senior Counsel, was that the courts below did not consider the case of the parties as provided under R 16(1)(d) the Rules framed under the Act According to the learned counsel for the petitioner even if the plea was not raised by the tenant it was the duty of the Court to take into account the requirements laid down under the aforesaid Rule The learned counsel in support of his proposition relied on the case Smt Rajrani Mehrotra v II Addl District Judge 1980 All Rent Cas 311 (SC) Sri Mohd Sher Siddiqui v III Addl District Judge Aligarh 1982 All Rent Cas 305 and Munni Devi v Ist Addl District Judge (1985) 2 All Rent Cas 219

6 It is no doubt correct that it was the duty of the Courts to consider the question of the needs of the landlord and tenant as required to be considered under 16(1)(d) of the Rules even though a plea in this regard has not been taken in the written statement but in my opinion whenever such a plea is raised before any Court the matter should be examined on the basis of the material on record This would be necessary because it may be possible that even though this plea is raised but no benefit under the provisions of the Rule could be given In some cases the accommodation may not be such which could be apportioned or in some case even if the entire accommodation is released, it may not be sufficient to the requirement of the landlord or may be just sufficient

7 In such cases where the plea is raised for the first time before this Court, it has to be prima facie seen as to what is the nature of the disputed accommodation and as to whether it could be apportioned in such a way that it may be utilised by the parties as also the extent of the accommodation in possession of the parties and their requirement for extra accommodation The present case when examined on the basis of the aforesaid observation it would be clear that for the family of the landlord which consists of self, wife married son and his family the accommodation of three rooms kitchen, one bath and latrine would be just sufficient for their requirment The disputed accommodation also which consists of three rooms, kitchen, two verandah bath and latrine is not such which could be apportioned Thus the accommodation available and the requirement of the landlord indicates that it can not be divided and the accommodation sought to be released is just sufficient for the requirement of the landlord The same view has been expressed in the cases Krishna Pal Singh v V Addl District Judge, Moradabad, (1986) 1 All Rent Cas 158, Devi Prasad Misra v II Addl District Judge Bareilly, (1986) 1 All Rent Cas 247 (1986 All LJ 796) Har Prasad v Addl District Judge Kanpur (1986) 2 All Rent Cas 106 (2) (1986 All LJ 1043) and Mata Prasad Dwivedi v I Addl District Judge Lucknow (1985) 1 All Rent Cas 9

8 Learned counsel for the respondents also contended before me that on the basis of the material on record It would not be possible to partly release the accommodation in their favour as there is no provision in the accommodation to accommodate two separate families For the reasons stated above, there is no force in the argument raised by the learned counsel for the petitioner and it is not necessary that the case be remanded for consideration of this question by the court below

9 The petition is devoid of merit and is accordingly dismissed but there shall be no order as to costs

10 Learned counsel for the petitioner prayed for time to vacate the disputed premises Considering the entire circumstances of the case, it would meet the ends of justice if the petitioner is granted one year's time to vacate the premises provided

the petitioner furnishes an undertaking to this effect before the Prescribed Authority within a period of 15 days after a certified copy of this order is received

Petition dismissed

1991 ALL L J 755

A N VARMA AND P P GUPTA JJ

Modi Spinning & Wvg Mills Co Ltd and another Petitioners v State of Uttar Pradesh and others Respondents

Civil Misc Writ Petn No 304 of 1979 D/ 13 12 1990

Registration Act (1908), S 78A (as amended by U P Act 48 of 1975) — Notifications Dt 31 3 1976 and Notification dt 18 7-1979 Prescribing registration fee for documents — Notifications ultra vires and inoperative as element of quid pro quo absent

Stamp Act (2 of 1899), Arts 1, 3 (as amended in its application to U P)

The imposition of registration fee on documents based on the notification dated March 31 1976 issued under the Registration Act is unconstitutional The element of quid pro quo is totally absent. The fee realised by the Revenue as registration fee constitutes part of the General Revenue of the State It is not kept in any separate account so as to be spent on providing service or expenditure by the Registration Department The imposition must therefore, be held to be unconstitutional No material change has been introduced by means of another notification dated July 18 1979 All that has been done under the notification of 1979 is that the maximum fee chargeable under Articles 1 and 3 of the Stamp Act has been enhanced from Rs 100/ to Rs 250/ The vice from which the earlier notification of 1976 suffered therefore continues

Special Appeals Nos 76 and 68 of 1971 D/ 30 8 1978 (All) Rel on

(Paras 3 5)

AI/DI/A66/91/GDR

Cases Referred	Chronological Paras
(1978) Special Appeals Nos 76 and 68 of 1971 D/ 30 8 1978 (All) (Rel on)	3

Bharatji Agarwal for Petitioners Standing Counsel for Respondents

A N VARMA, J — The petitioner is a public limited company incorporated under the Indian Companies Act 1913 having its registered office at Modinagar It arranged for a grant of loan of Rs 41 14 lacs from the Housing and Urban Development Corporation of India Ltd New Delhi For receiving this loan the petitioner executed a mortgage deed The deed was compulsorily registrable and was accordingly presented for registration before the Chief Sub-Registrar Ghaziabad on June 25 1979 It also submitted an application along with the deed stating that it may be informed of the exact amount to be deposited as according to it a fee of Rs 100/ only was legally chargeable as registration fee with respect to that deed Subsequently the petitioner discovered that the deed had not been registered whereupon the petitioner filed another application before the District Registrar stating that more than two weeks had passed and that the company was suffering huge loss on account of the non-registration of the document It was accordingly prayed that a registration fee of Rs 100/ be charged on the document and that a letter to that effect be issued so that the company could apply to the Chief Sub-Registrar to register the document on commission at Modinagar This prayer was disallowed by the District Registrar by his order dated July 9 1979 in which the Registrar stated that the company may deposit a sum of Rs 41 151/ towards the registration fee under protest, so that the matter may be referred for adjudication of the Inspector General of Stamps U P Allahabad It is apparent that the order asking the petitioner to deposit a sum of Rs 41 151/ towards the registration fee was founded on the notification dated March 31 1976 issued under the Registration Act A true copy of the relevant portion of that notification has been annexed as Annexure 3 to the petition According to this the registration fee prescribed for documents the value or consideration of which is over Rs. 1,000/- is as Rs. 21/- for the first Rs. 1,000/- and Rs. 3/- for every Rs. 500/- or part thereof in excess of Rs. 1,000.

2. The petitioner challenges the validity of the impugned orders as well as of the notification dated March 31, 1976 on the ground that the amount realized by the Revenue by way of registration fee goes towards the general revenue of the State inasmuch as no service is being rendered commensurate with the fee prescribed under the said notification, the imposition must be held to be ultra vires being without the authority of law.

3. The learned counsel is right. The contention is fully supported by a direct decision of this Court in Special Appeal No. 76 of 1971 connected with Special Appeal No. 68 of 1971, a true copy of which has been annexed to the petition as Annexure 7 to the petition. Incidentally those special appeals were filed by the State of Uttar Pradesh in the case of the petitioner company itself which had challenged the same notification. The learned single Judge had upheld the challenge and allowed the petition filed by the petitioner and declared the said notification of 1976 ultra vires. The decision of the learned single Judge was upheld by the Bench of this Court vide its judgment dated August 30, 1978 in the two special appeals mentioned. The learned Judges observed the element of quid pro quo was totally absent. The fee realized by the Revenue as registration fee constituted part of the General Revenue of the State. It was not kept in any separate account so as to be spent on providing service or expenditure by the Registration Department. The imposition was therefore held to be unconstitutional.

4. Keeping this dictum in mind, the court had repeatedly asked the respondents to file a supplementary counter affidavit to indicate whether the amount realized by the State by way of registration fee was going towards General Revenue or was being spent exclusively over the upkeep of the Registration Department. No affidavits have however been filed by the State. That being so the position remains unchanged since this Court last declared the notification of 1976 ultra vires and inoperative.

5. The learned Standing Counsel however, submitted that since then the notification of 1976 has been amended by means of another notification dated July 18, 1979 (Annexure CA 1) a copy of that notification. We have perused this notification and find that no material change has been introduced so as to render the decision of this Court in the Special Appeals mentioned above to review or as inapplicable to the present situation. All that has been done under the notification of 1979 is that the maximum fee chargeable under Articles 1 and 3 of the Stamp Act has been enhanced from Rs. 100/- to Rs. 250/-. The vice from which the earlier notification of 1976 suffered, therefore continued. The direction for the deposit of Rs. 41,151/- from the petitioner was thus plainly unsustainable and without jurisdiction. The maximum fee chargeable on the document submitted by the petitioner for the registration would therefore be Rs. 250/-.

6. In the result, the petition succeeds and is allowed. The District Registrar, Ghaziabad, is directed to refund the amount deposited by the petitioner in pursuance of the order of the District Registrar dated July 9, 1979. The District Registrar shall, however, be free to deduct a sum of Rs. 250/- out of that amount which is legally the amount of fee chargeable on the document.

7. The petitioner shall be entitled to its costs from the respondents.

Petition allowed.

1991 ALL L J 757

R R K TRIVEDI J

Mrigesh Chaudhary, Petitioner v Vice Chancellor G B Pant University of Agriculture and Technology, Pantnagar, Nainital and others Respondents

Civil Misc Writ Petn No 8835 of 1990, D/ 20 2 1991

Constitution of India, Art 226 — Natural Justice — Education — University — Failure to appear in one of the papers in examination due to being hospitalised — Regulations framed by University providing for permission to appear in make up examination of that paper — Refusal of permission by authorities without assigning reasons — Order violative of principles of natural justice

(Para 3)

S A Gilani, for Petitioner Dinesh Kackker for Respondents

ORDER — In this petition Sri Dinesh Kackkar has put in appearance for respondents 1 to 3 and has filed counter affidavit Rejoinder affidavit has also been filed. Learned counsel for the parties are agreed that the writ petition may be disposed of finally at this stage

2 The facts giving rise to this petition are that the petitioner was doing course of Bachelor of Veterinary Science and Animal Husbandary from Govind Ballabh Pant University of Agriculture and Technology, Pant Nagar district Nainital. Here in after referred to as the University His case is that while doing First Year course he had gone on leave from 13th May 1989 to 14th May 1989 as he wanted to appear in examination of Central Board of Secondary Education which was to be held at Delhi Admission card of the said examination has been filed as Annexure-1 to the writ petition The petitioner has further stated that he suddenly fell ill at Delhi on 13th May 1989 and could not appear in the said examination and after recovery could come back to Pantnagar on 15th May 1989 For this reason he could not appear on 13th May 1989 in the examination in paper of Animal Management. While he could appear in all the subsequent papers Then he moved an application on 17th May 1989 for being permitted to appear in Makeup examination However he has not been informed of any order passed on this application and he was not allowed to appear in the Makeup examination In second semester considering over all performance of the petitioner he has been dropped from the roll of University on the ground of bad performance The petitioner s submission is that in case he was allowed to appear in Makeup examination in Paper Animal Management he could have improved his grade in that paper and with improved performance in first semester his overall grading could be improved in second semester also For consideration before the Petition Committee it was necessary for the petitioner to obtain a minimum grading of 2 55 and as on the application no orders were passed though medical certificate was filed to show that the petitioner was hospitalised, he has suffered irreparable loss and injury and has been deprived further pursuit of academic career

3 Sri Dinesh Kackkar appearing for the University has stated that the application of the petitioner was forwarded to the Petition Committee and it was decided on July 25/26 1989 The order has been quoted in Para 11 of the counter affidavit which reads as under

The committee found that as per existing regulations the permission for taking make up examination to the respondents cannot be granted

Sri Kackkar says that the petitioner was informed of this order and under regulation he cannot be allowed to appear in the Makeup examination under Regulation 17(c) which has been quoted in Para 7 of the writ petition and which has not been disputed in the counter affidavit A student can be permitted to appear in Oakeup examination at the discretion of the Dean of the College concerned subject to such direction as may be issued by the Vice Chancellor from time to time on the ground of Hospitalization of the student death of parent, own marriage attending interview and attending some court cases The petitioner has made clear averment that he was hospitalised and for this reason could not appear in the Paper of Animal Management From the counter affidavit it does not appear that the Dean of the College concerned has considered his application or passed any order as required under Regulation 17(c) Sri Dinesh Kackkar has stated that this application was decided by the Petition Committee vide order quoted in para 11 of the counter affidavit. I have perused this order Firstly counter affidavit I have perused this order Firstly the petition committee had no jurisdiction to pass this order deciding the application to appear in the Makeup examination and this order can be ignored on this very ground. However, a perusal of the order further shows that there is not a word disbelieving the contention of the petitioner that he was hospitalised on the relevant date and for that reason he could not appear in the examination in Paper Animal Management held on 15th May 1989 The requirement of Regulation 17(c) is that if the student is hospitalised and was unable to appear in a particular paper he can appear in Oakeup examination of that paper On this fact pleaded by the petitioner his application cannot be rejected Thus even assuming for the sake of arguments that the Petition Committee can decide the application the order is per se erroneous in law and violative of principles of natural justice as no reasons have been recorded In fact the petitioner was legally entitled to appear in Makeup examination and this long delay has been caused due to illegal and arbitrary acts of the respondents

4 For the reasons recorded above, this writ petition is allowed. The order passed by the Petition Committee dated 26-12 1989 shall be ignored. Since about more than a year has already passed, it may not be proper to direct the Dean of the College concerned to decide the application moved by the petitioner on 17th Oay 1989 In the interest of justice K think it proper to direct the respondents 1 to 3 to allow the petition to appear in Makeup examination in paper Animal Oanagement which is scheduled from 25th February, 1991 On the basis of the marks obtained by the petitioner in the said Oakeup examination fresh grading shall be awarded to him in first semester and then result of the second semester shall be pronounced afresh During all these times the petitioner shall be treated as a regular student of the college The order of the respondents that the petitioner shall be dropped from the roll of the Wniversity is also set aside

5 A certified copy of this order shall be given to the learned counsel for the petitioner on payment of usual charges within two days.

Petition allowed

1991 ALL. L J 758

D S SINHA, J

Subhash Chandra Bhatnagar, Petitioner v VIII Addl Civil Judge/prescribed Authority, Oerut and another. Respondents

Civil Misc Writ Petn No 7191 of 1991. D/ 29-4 1991

U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, (13 of 1972) — S 21 — Eviction proceedings — Stay of — Appeal arising out of suit involving question of ownership — Issues involved in appeal and in eviction proceeding — Are distinct and different — Pendency of appeal — Cannot be a ground for stay of eviction proceedings

Civil P C (5 of 1908), S 151

(Paras 3, 4)

Shashi Nandan, for Petitioner, *Standing* Counsel, for Respondents

ORDER — Heard learned counsel for the petitioner

2. By means of the impugned order VIII Addl. Civil Judge, Oeerut, has declined to accept the prayer of the petitioner for stay of the proceedings of case No 148 of 1989, initiated against him by the respondent No 2, under Section 21 of the U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act 1972 (U P Act No XIII of 1972)

3 The petitioner sought the stay of the proceedings on the ground of pendency of the First Appeal No 354 of 1988 in this Court This appeal has indisputably, arisen out of suit involving the question of ownership of the respondent No 2 in respect of disputed premises The proceedings under Section 21 of U P Act No XIII of 1972 are to be decided on the basis of relationship of landlord and tenant between the petitioner and the respondent No 2 For the purposes of maintaining an application under Section 21, the applicant need not be the owner of the accommodation It is enough if he is a landlord vis a vis the tenant in the accommodation within the meaning of the aforesaid Act

4 The learned Civil Judge has rightly concluded that the issues involved in the appeal pending in this Court and the proceedings before him are quite distinct and different and that the pendency of the appeal in this Court cannot constitute a ground for stay of thant any interference

For the foregoing reasons, the Court is clearly of the opinion that this petition lacks merit and deserves to be dismissed summarily It is ordered accordingly

Petition dismissed

1991 ALL. L. J 759

N N MITHAL AND
B DIKSHIT, JJ

Amar Singh Rathor and another, Petitioners v District Magistrate Fatehpur and others Respondents

Civil Misc Writ Petn No 8999 of 1991, D/ 28 3 1991

U P Co-operative Societies Act (1965), Ss 70, 71, 98 — U P Co-operative Societies Rules (1968), Rr 229(2)(b), 230(c) — Reference to Registrar — Decided by S D M appointed by Registrar — Appeal against, under S 98 — Lies to Registrar

Whenever a dispute arises under S 70 of the Act the matter is to be referred to the Registrar This reference to the Registrar is not for entering upon arbitration but only for taking action in accordance with the provisions of the Act and the Rules The Registrar s power in this regard is merely in the nature of an agent to have the matter decided by an Arbitrator and such Arbitrator may be the Registrar himself or an Arbitrator appointed by him or the Board of Arbitrators, if the parties pray for that Further when a dispute is referred under the provisions of U P Co-operative Societies Rules, Rule 229(2)(b), reference has to be made to the District Magistrate and under Rule 230(e) the District Magistrate may either himself decide the dispute or may appoint any one of the sub-divisional Magistrates under him to act as an arbitrator The arbitrator who is appointed, therefore, is not a delegatee from the District Magistrate or the Registrar but he happens to be a person holding an independent position as an arbitrator While discharging the duties as an arbitrator he does not act as a subordinate to the District Magistrate and his powers are in no way dependent upon the directions the District Magistrate may issue despite the powers of the District Magistrate to withdraw any matter referred to an appointed arbitrator Therefore the appeal against the decision of the arbitrator under S 98 would lie to the Registrar and not to the State Govt

(Paras 7 9 10 12)

A Kumar, for Petitioners, Standing Counsel for Respondents

N N MITHAL, J — Against an award given by the S D M an appeal was filed before the District Magistrate An objection was taken that the District Magistrate had no jurisdiction to entertain the appeal That objection has been rejected by the impugned order dated 14 2 1991 (Annexure '4' to the writ petition)

2 A dispute was raised by respondent No 2 under Section 70 of the U P Co-operative Societies Act, 1965 and a reference was made to the Registrar/District Magistrate, Fatehpur The Registrar referred the matter to the Sub-Divisional Magistrate who was appointed arbitrator He decided the same vide his order dated 27th August, 1990

3. Aggrieved by the order passed by the Arbitrator/S D M an appeal under Section 98 of the U P Co-operative Societies Act was filed before the Registrar Notices were consequently issued by the Registrar/District Magistrate in pursuance of which the petitioner filed an objection before him raising the question of jurisdiction The ground was that the District Magistrate has no jurisdiction to hear the appeal Earlier a writ petition was also filed in this Court for a direction that the District Magistrate may not proceed any further with the hearing of the appeal The said petition was disposed of by order dated 8 1-1991 with a direction that the question of jurisdiction raised by the petitioner will first be decided by the District Magistrate before hearing the appeal

4 Subsequent to the order passed by this Court the District Magistrate decided the objection by the impugned order dated 14-2 1991 holding that the appeal lay to him and that there was no lack of jurisdiction Aggrieved by that order the present petition has been filed

5 The main submission of the learned counsel for the petitioner is that the reference is made to the District Magistrate as Arbitrator and he himself having delegated the work for arbitration to the S D M cannot himself hear the appeal against the order passed by his own delegatee, the S D M

6 We have heard learned counsel for the parties at length who have very elaborately pointed out the relevant provisions It is not disputed that the dispute raised by respondent No 2 was one which was covered by Sub-section 1 of Section 70 of the U P Co-operative Societies Act According to that sub-section whenever such a dispute is raised the same shall be "referred to the Registrar for action in accordance with the provisions of this Act and the rules " Section 71 of the Act lays down the procedure when a reference of a dispute for arbitration is made The relevant portion of the section reads as under

> 71 Reference of dispute to arbitration
>
> On receipt of a reference under sub-section (1) of Section 70, the Registrar may, subject to the provisions of the rules, if any —
>
> (a) decide the dispute himself, or
>
> (b) refer it for decision to an arbitrator appointed by him, or
>
> (c) refer it, if the parties so request in writing, for decision to a board of arbitrators consisting of the three persons to be appointed in the prescribed manner

7 A reading of these two provisions will show that whenever a dispute arises the matter is to be referred to the Registrar but this reference to the Registrar is not for entering upon arbitration but only for taking action in accordance with the provisions of the Act and the Rules The Registrar's power in this regard is merely in the nature of an agent to have the matter decided by an Arbitrator and such Arbitrator may be the Registrar himself or an Arbitrator appointed by him or the Board of Arbitrators, if the parties pray for this For the purposes of Sections 70 and

71 rules have been framed and Chapter XVIII of the rules deals with the statement of dispute Rule 225 lays down that a dispute relating to any matter covered by S 70 shall be raised on a prescribed form by an aggrieved party who shall apply to the Registrar stating the substance of the dispute and the claim Rule 229 enumerates various kinds of disputes which may arise and it also provides for authorities who are to decide the particular matter by arbitration in respect of each of them Sub-clause (2) of this rule lays down as under —

(2) Where the dispute relates to the constitution of the committee of management or election or appointment of any office bearer or a delegatee of a co-operative society, reference shall —

(a)

(b) in the case of an apex co-operative society be made to the District Magistrate of the district to which the society belongs

8. Rule 230 in so far as it is relevant for our purpose reads as under

230 On receipt of a reference under Rule 229 —

(a) to (d)

(e) the District Magistrate may decide the dispute himself or appoint any one of the sub-divisional Magistrates under him to act as arbitrator or as president of board of arbitrators as the case may be

9 On a reading of Rules 225, 229 and 230 it will be evident that when a dispute is referred under the provisions of Rule 229(2)(b), as in the instant case reference shall be made to the District Magistrate When read with Rule 230(e) the District Magistrate may either himself decide the dispute or may appoint any one of the sub-divisional Magistrates under him to act as an arbitrator In this case when the reference of dispute was made according to Rule 229(2)(b) the reference had to be made to the District Magistrate (Here we may point out that the District Magistrate has been conferred with powers of Registrar under the Act vide Government Order dated (sic) The District Magistrate is empowered by Rule 230(e) to adopt any of the three alternative modes for deciding the dispute He may decide the dispute himself or may appoint any one of the Sub-Divisional Magistrates under him as Arbitrator or refer it to a board of Arbitrators

10 The argument of the learned counsel for the petitioner was that when on a reference being made to him the Registrar chooses that he shall not decide the dispute himself, he can refer it for decision to an arbitrator appointed by him It is significant to note that the word appointed has been used in Section 71 (1)(b) as also in Rule 230(e) The arbitrator who is appointed therefore, is not a delegatee from the District Magistrate or the Registrar but he happens to be a person holding an independent position as an arbitrator While discharging the duties as an arbitrator he does not act as a subordinate to the District Magistrate and his powers are in no way dependent upon the directions the District Magistrate may issue despite the powers of the District Magistrate to withdraw any matter referred to an appointed arbitrator In this connection Section 98 of the Act may also be referred which provides for appeals against the award etc Relevant portion of the section reads as under

(1) An appeal against

(a) to (g)

(h) an award made by an arbitrator or board of arbitrators under sub-section (1) or sub-section (2) of Section 71

(i) to (n)

may within thirty days of the communication of the order decision or award to be appealed against be preferred by the aggrieved party to the authorities mentioned in sub-section (2) in the manner prescribed.

Sub-clause (2)

An appeal under clauses (d), (f), (g), (k), and (i) of sub-section (1) shall be referred to the Tribunal and an appeal under clauses (a), (b) (c) (e) (h) (i) (j) (m), and (n) of the said sub-section shall be preferred —

(a) if the decision or the order was made by the Registrar to the State Govt., or

(b) if the decision or order or award was made by any other person or authority to the Registrar

11 It is not disputed that the appeal here shall lie under sub-clause (b) of Section 98(1) The question is whether the decision in this case will be deemed to have been made by the Registrar or by other person' or authority The submission of Sri A Kumar for the petitioner was that the Sub-Divisional Magistrate acted only at the behest of the District Magistrate as Registrar and, therefore, he was exercising the same powers as the Registrar while deciding the dispute as an arbitrator The contention of Sri Triloki Nath, counsel for the respondent was that the decision given by the Sub-Divisional Magistrate was not in his capacity as Registrar or as a delegatee of Registrar but the same was in his independent character as arbitrator appointed under Section 71(1)(b)

12 As we have seen earlier the words 'Registrar and District Magistrate' have not been used as interchangeable as Sections 70 and 71 refer to the powers of the Registrar Authority of District Magistrate emerges only under Rule 229(2)(b) where it is said that the reference in respect of the dispute relating to constitution etc of a Co-operative Society shall be made to the District Magistrate Even the District Magistrate has been given the power either to arbitrate himself or appoint Sub-Divisional Magistrate under him as the Arbitrator We have already seen the significance of the word 'appoint' and this appointment makes the status of the Sub-Divisional Magistrate as an independent entity He decides the matter as arbitrator and, therefore, for the purposes of Section 98(2)(b) it will be deemed that it was an award made by any other person or authority Obviously, this decision by the S D M as arbitrator cannot be termed as the decision of the Registrar It could be a decision by the Registrar only if on a reference of dispute being made he had decided to arbitrate in the matter himself This having not been done and he having appointed the S D M to arbitrate in the matter it shows that it was a decision not by the Registrar but by a person other than the Registrar That being so we are clearly of the opinion that the appeal against the decision of the arbitrator under Section 98 shall lie to the Registrar and not to the State Govt as contended by the petitioner

13 Accordingly, we do not find any illegality in the impugned order The writ petition has no merit and is dismissed

Petition dismissed.

1991 ALL. L J 762

PALOK BASU, J

Rambali Petitioner v Assistant Director of Consolidation, Basti and another, Respondents

C M W P No 4612 of 1991, D/ 8-2 1991

U P Consolidation of Holdings Act (5 of 1954), S 48 -- Consolidation proceedings -- Notification under Section 52 published -- Order of consolidation officer found to be Judged one and brought about fradulently -- Dy Director can revise order and remand matter to consolidation officer under S 48, for deciding matter on merits

The Deputy Director of Consolidation is in charge of all proceedings that comes within his territorial jurisdiction relating to the consolidation of village and overall power has been conferred on him under S 48 Further he is empowered to judge the correctness or even the propriety of an order or proceeding coming up from proceedings before any of the authorities working under him Therefore where the Deputy Director of Consolidation recorded the finding that the alleged order of Consolidation Officer was a forged one and was brought about fraudulently he had power to entertain the revision and remand the matter to the Court of Consolidation Officer for deciding the matter on merits, even after notification under S 52 was published so that, no one should have grievance as to existence of his rights.

(Paras 5, 6 7)

Cases Referred Chronological	Paras
1989 Rev Dec 281	4, 7

S D Pathak for Petitioner Standing Counsel, for Respondents

ORDER — This writ petition has been filed by Rambali against the order of the Deputy Director of Consolidation dated 14 12 1990 By the impugned order the Deputy Director has directed that benefit of S 5 of the Indian Limitation Act should be made available to the respondent Begedu and his objection may be treated as contest of title/ownership relating to the property which is converted into chack Nos 18 19 and 22 during the consolidation operations and then the lis between the respondent and the petitioner may be decided in accordance with law by the Consolidation Officer at the relevant stage

2. The relevant facts are A revision was filed by Bagedu before the Deputy Director of Consolidation under S 48 of the Consolidation of Holdings Act (hereinafter referred to as the Act) alleging therein that it was only on a prohibition put by the petitioner in the respondent s reaching the field that he smelt some foul play relating to the property rights as a result of which the respondent got the records inspected which revealed that C H Form No 23 purported then to have an order allegedly passed in the year 1972 recording the name of the predecessor of the petitioner in the said three chaks Nos 18, 19 and 22 It further transpired from the enquiry no records or file could be traced as to justify the giving birth to the said order of mutation (Amaldarmad) in favour of the petitioner Consequently he filed the revision along with the prayer that the delay in filing the revision may be condoned as all proceedings, if any have gone on illegally with the result that a genuine dispute has arisen relating to the rights of the respondent In order to support the allegations made in the revision the respondent had filed enquiry reports from the office of the Consolidation Officer and also relevant authorities indicating that neither there was any file nor any order which may justify the existence of the mutation order (Amaldaramad) as indicated above The Deputy Director of Consolidation issued notice on the revision and after hearing the petitioner and the respondents directed that in view of the allegations made by the respondent benefit of S 5 of the Indian Limitation Act must be extended to him It may be noted here that the respondent had claimed himself to be an illiterate villager

3. By the impugned order dated 14 12 1990 the Dy Director of Consolidation has directed the matter to be remanded to the Court of the Consolidation Officer so that the dispute about rights and ownership as raised by Bagedu as against Rambali the petitioner may be decided on merits in accordance with law without paying any heed whatsoever to the alleged order dated 4-3-1972 which was more than obviously a forgery and a fraud

4. Sri S D Pathak, learned counsel for the petitioner cited three authorities but mainly relied upon the decision of a Division Bench of this Court reported in Hari Ram v Deputy Director of Consolidation (Azamgarh), 1989 Rev Dec 281 On the strength of the said decision it was sought to be made out that no revision lay before the Deputy Director of Consolidation and, therefore, the writ petition should be admitted. The argument is that once a notification under S 52 of the Act has been made and published, all proceedings come to an end. It is therefore, argued that the said order dated 4-3-1972 having become final by virtue of notification under S 52 dated 25th December 1976, the Deputy Director of Consolidation possessed no jurisdiction to reopen the matter

5 The argument advanced on the facts of the present case though attractive lacks substance Firstly the Deputy Director of Consolidation is in charge of all proceedings that come within his territorial jurisdiction relating to the consolidation of village Overall power has been conferred by the said section as may be readily seen by the section itself which is quoted hereunder

"48 Revision and reference— (1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings or as to the correctness legality or propriety of any order (other than interlocutory order) passed by such authority in the case of proceedings and may after allowing the parties concerned an opportunity of being heard make such order in the case of proceedings as he thinks fit."

6. Under the Rules. 30 days is the limitation fixed for filing a revision It is well settled that the limitation begins from the date of knowledge of an order The Deputy Director of Consolidation has in the instant case accepted the plea of the respondent after hearing the petitioner and giving him an opportunity that there was sufficient reason to hold that the respondent had no knowledge and for that matter could not have any knowledge of an order which was ab initio non existent The finding of the Deputy Director of Consolidation that the alleged order dated 4-3 1972 was a forged one and was brought about fraudulently must be accepted as correct in view of the sound reasoning found in the impugned order Consequently it follows that the Deputy Director of Consolidation is empowered to judge the correctness or even the propriety of an order or proceeding coming up from proceedings before any of the authorities working under him Consequently it would be an injustice had he after recording a finding that the so called order dated 4 3 1972 was fraudulent one not granted relief to the respondent It must be said to the credit of the Deputy Director of Consolidation that he has remanded the matter to the Court of the Consolidation Officer for deciding the matter on merits and. therefore. no one should have a grievance as to the existence of his rights and if so, he must vindicate his rights on merits before the Consolidation Officer

7 Coming to the ruling it may be noted that there is no reference to sub-sec (2) or sub-sec (3) of S 52 of the Act in the aforesaid decision in the case of Hari Ram (1989 Rev Dec 281) (supra) For a ready reference it may be mentioned that sub-sec (2) of S 52 was brought about by an amendment which says that notwithstanding anything contained in sub sec (1) any order passed by the Court of competent jurisdiction in cases of writs filed under the provisions of the Constitution of India or in cases of proceedings pending under this Act on the date of issue of notification under sub-sec (1) shall be given effect to by such authorities as may be prescribed and the consolidation operations shall for that purpose. be deemed to have not been closed On the facts of the present case it must be held that the matter agitated by the respondents would be deemed to be pending because it was through a fraudulent and forged order that his alleged rights were being thwarted by the petitioner Consequently it should be held that the power of the Deputy Director of Consolidation existed in entertaining the revision and in deciding it on merits after hearing the parties to the said revision who might have been affected thereby

8. In view of the aforesaid discussion the argument of Sri S D Pathak must fail and this writ petition is dismissed summarily

Petition dismissed

1991 ALL L J 765

B P JEEVAN REDDY, C J AND S R SINGH, J

Messrs D L Sah and Party and others, Petitioners v The Collector/District Excise Officer, Almora Opposite Party

Civil Misc Writ No 583 of 1980, D/ 2 4 1991

(A) U P Excise Act (4 of 1910) S 39 — U P Excise Manual Para 368, R 6(11) — Licence fee — Balance of — It is excise revenue — Can be recovered as arrears of land revenue

The rules and conditions of auction sale of licence to vend liquor make it amply clear that a bidder by offering a bid which is provisionally accepted incurs the liability to pay the excise revenue recoverable as arrears of land revenue under S 39 in terms of the rules and conditions of auction sale and such liability is independantly of any contractual obligation arising out of valid contract which may come into existence upon the bid being finally sanctioned by the Excise Commissioner Although the final acceptance of any bid is subject to the sanction of the Excise Commissioner the power to grant or refuse sanction is not arbitrary It is regulated and controlled by the object and purpose of the Act and the guide-lines prescribed in this regard in the rules referred to hereinbefore A bidder whose offer is provisionally accepted can challenge the order refusing the sanction on the ground of the order being arbitrary and violative of Art 14 of the Constitution Thus a bidder whose bid is provisionally accepted not only incurs certain liabilities both civil and criminal (as per sub para 3(1) of paragraph 374 of the Manual), in the event any breach being committed by him of the conditions as to payment of the licence fee in terms of the rules and conditions of auction sale but he also acquires the right of his bid being finally sanctioned by the Excise Commissioner in terms of the very rules and conditions read with Art 14 of the Constitution The liability and the right referred to above arise and flow also from the statutory rules and conditions of sale and are quite independent of rights and liabilities flowing and arising out of a concluded contract between the parties (Para 15)

Where the bid of a person for licence to vend foreign liquor was accepted and he not only made initial deposit but obtained provisional licence and transacted business on that basis for some time balance of licence fee would be recoverable as arrears of land revenue In such a case the fact that he had requested permission to withdraw from lease would not absolve him of his liability to pay the balance of licence fee (Para 18)

(B) U P Excise Act (4 of 1910), S 39 — Licence fee — Balance of — It is excise revenue — Can be recovered even if there is no concluded contract

Where the bid for licence to vend liquor was provisionally accepted the bidder would be liable to pay the balance of licence fee and it could not be said amount due was not an amount due on concluded contract S 39 visualises recovery of all excise revenues including all amounts due to the Government by any person on account of any contract relating to the excise revenue The liability of the bidder to pay the balance of the excise revenue accrues on the basis of the statutory rules and for the accrual of this liability existence of a concluded contract was not necessary (Para 27)

Cases Referred Chronological Paras

AIR 1984 SC 1326	1984 Tax LR 2551	24, 25
AIR 1983 SC 1066	1984 E FR 210	21
1983 UPTC 436	1983 All CJ 271	19
1980 All LJ 278	AIR 1980 SC 680	2, 18
AIR 1980 SC 2018	1980 Tax LR 2362	22
1979 Tax LR 2451	1979 UPTC 1033	2, 19
AIR 1971 SC 2295	(1970) 2 SCR 594	16
AIR 1954 SC 349		4

M/s Murlidhar Pradeep Kumar, Sudhir Chandra, V B S Negi for Petitioner S C for Opposite Party

JEEVAN REDDY C J — I agree with my learned Brother S R Singh J that this writ petition must fail However having regard to the fact that the question involved in this case is arising frequently I think it appropriate to say a few words. All the necessary facts are stated in the judgment of my learned Brother and I would mention them only to the extent necessary herein The auction in respect of the Ranikhet shop took place on 10 5 1980 The highest bid of the petitioners was in the sum of Rs 2 65,000/ They made the necessary deposits on that day itself and on the following days Before however the licence could be issued they sought to withdraw their bid through a letter dated 19 5 1980 Notwithstanding the said letter the petitioners paid certain further amounts on 23 5 1980 and 2 6-1980 (vide paragraph 10 of the counter affidavit) and obtained the licence on 3-6 1980 They purchased foreign liquor on the basis of the said licence and did business for a few days It is not stated that the licence granted to the petitioners was a provisional licence It was a regular licence Then the petitioners say, they sent a telegram on 8-6 1980 seeking to surrender the licence Thereafter, the petitioners failed to pay the further amounts payable according to the Rules and the licence The respondents have taken proceedings for recovering the balance amount, which is being challenged in this writ petition

2. The first argument of Sri Sudhir Chandra, learned Counsel for the petitioner, is that in asmuch as the Excise Commissioner confirmed the bid only on 13 6-1980 and because the petitioners had surrendered the licence through a telegram even on 8-6-1980, there was no concluded contract between the parties and hence no amount can be recovered from the petitioners and certainly not as arrears of land revenue Reliance is placed on the decision of the Supreme Court in State of U P v Kishori Lal, AIR 1980 SC 680 1980 All LJ 278 and a Bench decision of this Court in Dhunmun Ram v State of U P 1979 UPTC 1033 1979 Tax LR 2451 My learned Brother has elaborately discussed these cases and pointed out why the ratio of the said decisions is not applicable herein and I agree with him It is true that the Commissioner confirmed the petitioners bid formally on 13 6 1980 but long prior thereto i e on 3 6 1980 the licence was granted to the petitioners Since it was not a provisional licence but a regular licence it must be taken that the grant of licence amounted to confirmation of the bid The petitioners not only took the licence by paying the necessary amount but also did business for sometime In such a situation the argument that there was no concluded contract is ex facie untenable So far as the letter dated 19 5 1980 is concerned it must be taken to have been withdrawn inasmuch as the petitioners themselves paid further amounts subsequent to the said letter and took out the licence The petitioners cannot go back and rely upon the said letter In such a situation Section 39 clearly applies and the amount due from the petitioners would be excise revenue which can be recovered as arrears of land revenue

3 Sri Sudhir Chandra relied upon the conditions of auction contained in paragraph 373 of the U P Excise Manual, which governed the auction in question Clauses 2 3 and 6 of the said paragraph read as follows —

"(2) The final acceptance of any bid is subject to the sanction of the Excise Commissioner which in its turn is subject to decision by the Government in appeal or revision if any

(3) Every person bidding will be held to his bid whether it be the highest or not "

"(6) A sum equal to one Sixth of the annual fees in the case of country spirit shops and a sum equal to one fourth of the annual licence fees in the case of foreign liquor shops shall be payable immediately on the conclusion of the sales for the day, and the balance by such instalments as are specified in the licence to be granted If default be made in the payment of the advance instalment the shop or farm will be resold and if the price finally offered at the re-sale be less than that bid at the first sale the difference will be recovered from the defaulters through a civil suit

Mr Sudhir Chandra argues that Cl (6) applies not only to the advance instalment, which has to be paid before taking out the licence, but also to the instalments payable subsequent to the grant of licence We cannot agree The language of Cl (6) is very clear Paragraph 373 deals with the stage of auction The advance instalment referred to in Cl (6), is 1/4th of the annual licence fee in the case of foreign liquor shops and 1/6th of the annual fees in the case of country spirit shops Cl (6) says that if this advance instalment is not paid, as provided therein the shops or farm will be resold and the loss occurring therefrom if any shall be recovered from the defaulter through a civil suit Cl (6) has no application to subsequent instalments, though it formally reiterates the said obligation as well. The consequence of default in paying subsequent instalments is provided in paragraph 174 of the Excise Manual and also by the conditions of licence In my opinion therefore, Cl (6) of paragraph 373 has no application to the instalments payable subsequent to the grant of licence and if so the provision made therein that the difference shall the recovered through a civil suit has no application herein S 39 of the U P Excise Act clearly provides that in case of a default by a holder of a licence the Collector may take the grant and manage it himself or forfeit it or re-sell it at the risk and loss of the defaulter It is this provision which applies here

4 It is then argued that the respondents have made no attempt to re-sell the licence and that the respondents were bound to take all necessary steps for mitigating the damage This plea has not been specifically raised in the writ petition and, therefore, the respondents had no opportunity of clearly meeting the same The language of S 39 is wholly distinct and different from the language employed in Cl (6) of paragraph 373 It is also wholly distinct from the language used in R 84(1) of O 21 C P C In such a situation the ratio of the decision of the Supreme Court in M M Shah v Sardar S Ahmed AIR 1954 SC 349 cannot be imported It is equally doubtful whether the said rule evolved under the Contract Act is applicable in a contract governed by statutory provisions

5 For the above reasons, I agree with my learned Brother that the writ petition should be dismissed

S R SINGH, J — 5A United Provinces Excise Act 1910 (hereinafter referred to as an Act) as adapted and modified by the adoption of laws Order 1950 is a complete Code in itself relating to the import export, transport manufacture sale and possession of intoxicating liquor and intoxicating drugs

6 Section 24A of the Act provides for the grant of exclusive or other privileges in respect of foreign liquor which we are concerned with in the present case The right of the State to sell the exclusive privilege of selling liquor is unquestionable and it is undeniable that the main and important purpose of selling this privilege is to raise revenue for the State exchequer The task of protecting revenue by securing best price for privilege, has necessarily to be entrusted to the Executive Government and this is what the Scheme of the Act envisages

7 There is no gainsaying the fact that public auction is one of the modes of getting the best possible price A public auction for the wholesale vend of foreign liquor viz licences in Form F L-2, was held in the district of Almorah on 10-5 80 for the purpose of conferring exclusive privilege of supplying foreign liquor to the retail vendors holding licences in Form F L 5 in the district of

Almorah including the town of Ranikhet The auction was held in a group for two shops one in the Town of Almorah and the other in the town of Ranikhet for the period commencing from 15 5 80 and ending on 15 11 80 Two licences in Form F L 2 one for Almorah and the other for Ranikhet were to be issued on the basis of the said auction

8 The petitioner were the highest bidders in respect of the aforesaid two licences in Form F L 2 The bid for F L 2 licences in respect of Almorah was of Rs 2 61 000/ while in respect of Ranikhet, it was of Rs 2 65 000/ In respect of Ranikhet shop they deposited Rs 21 250/ on the date of auction and Rs 22 000/ on 23 5 80 and Rs 23,000/ on 2-6 80 The amount so deposited by way of advance licence fee in respect of the licence for Ranikhet was Rs 66,250/ In addition to the aforesaid amount of advance instalment, the petitioners also furnished a Bank guarantee to the tune of Rs 39 750/ on 2 6 80 to meet the requirements of para 642 of the Excise Manual Thereafter the petitioners received the requisite licence on 3 6 80 and applied for and obtained the authority to purchase foreign liquor and they purchased liquor on the basis of the said authority and sold the same both at Almorah town and Ranikhet town to F L 5 licensees They continued with their business and went on depositing instalments to the tune of Rs 1,85,520/ A sum equal to Rs 79,480/ remained unpaid in respect of Ranikhet licence There is no dispute relating to licence in respect of Almorah and the present writ petition is confined to the licence in respect of Ranikhet alone It is the balance amounting to Rs 79,480/ which is sought to be recovered from the petitioners as arrears of land revenue and by means of the present petition the petitioners have sought for a writ of certiorari quashing the entire recovery proceedings and also for a writ of mandamus directing the respondents to refund the amount deposited by them as aforesaid

9 We have heard Sri Sudhir Chandra learned counsel appearing for the petitioners and Sri K B Mathur learned standing counsel appering for the respondents

10 The first contention raised on behalf of the petitioners is that the amount sought to be recovered not being due on account of any concluded contract between the petitioners and the respondents with regard to grant of exclusive privilege for wholesale vend of foreign liquor viz the licences in Form F L 2 in respect of the town of Ranikhet cannot be recovered under S 39 of the Act It is urged that no concluded contract came into being inasmuch as the petitioners withdrew their offer before it was finally sanctioned by the Excise Commissioner and to lend strength to this contention the learned counsel for the petitioners has placed reliance upon a letter dated 19 5 80 addressed to the Excise Commissioner U P Lucknow expressing their inability to run the F L 2 shop at Ranikhet and praying for cancellation of the licence aforesaid a also upon a telegram dated 8 6 1980 sent to the Excise Commissioner U P whereby Sri Madan Mohan Agarwal a partner of D L Shah and Party Almorah had intimated the Excise Commissioner their withdrawal from Ranikhet F L 2 shop with immediate effect The contention of the learned counsel for the petitioner is founded upon the assumption that except under and in accordance with the terms of a concluded contract the petitioners cannot be held liable to pay the amount sought to be recovered from them as arrears of land revenue under S 39 of the Act A conspectus of the relevant provisions in the Excise Manual, however leads us to conclude otherwise

11 It is therefore necessary as well as useful to examine those provisions of the Excise Manual which deal with the auction system of grant of exclusive privileges in foreign liquor Paragraph 368(1) of the Excise Manual provides that the licence fee for the whole sale vend of foreign liquor to wholesale

and retail vendors and for the retail vend of the commodities specified in Cls (a) (b) (c) and (d) of the said sub-paras under the auction system shall be fixed by public auction periodically However the right to grant any licence on payment of fixed fee or fee determined in accordance with the graduated or uniform scale or by tender or by tender cum auction system is reserved with the Excise Commissioner Paragraph 368 of the Excise Manual in so far as it is quoted as below for better understanding of the controversy involved in the case —

"368— 6(6) The final acceptance of any bid is subject to the sanction of the Excise Commissioner which in its turn is subject to the decision of the State Government in appeal or revision, if any

(7) Every person bidding will be held to his bid whether it be highest or not and all such bids shall remained valid till the final decision of the Excise Commissioner or for a period of sixty days whichever is earlier

(8) A sum equal to one fourth of the bid offered by the highest bidder shall be paid in advance as security for due performance of the contract out of which two-third shall be paid immediately on the fall of hammer In cash If the Collector recommends the second highest bid for sanction by the Excise Commissioner the second highest bidder will also be required to deposit the security amount as mentioned above

(10) The licence fees shall be payable in such equal instalments as are specified in the licence In case the payment of due instalment is not made by 20th day of the month the same shall be recovered from the security deposit of the licensee

(11) In case of default to pay the security deposit as mentioned in sub-rules (8) to (10) within the time specified, the auction and in case a licence has been issued the licence shall stand cancelled and the deposit if any shall be forfeited to the Government Re-auction or alternative arrangements shall be made at the risk of the original auction purchaser All monetary losses resultking from re auction or alternative arrangement or from the licence remaining unsold for want of bidders shall be recoverable from the original auction purchaser as arrears of land revenue

7(5)(b)— Where no reason to the contrary exists, the highest bid, if adequate should be accepted But this provision is subject to two important considerations Firstly care should be taken to exclude bids obviously in excess of fair market value of the licence or farm or which are the results of speculation or rivalry The acceptance of such bids even if the bidders fulfil their engagements is immediately injurious to the interests of the consumer and ultimately to the Excise Revenue This precaution is particularly necessary in the case of farming contracts which are worked by means of sub-settlements made by the farmer Secondly it is necessary to guard against the acceptance of bids which may have the effect of constituting an overt or covert monopoly and against the acceptance of licence holders of undesirable persons of doubtful solvency No person whose name appears upon the district of State defaulters list shall be allowed to bid

(8)(a) KI any person whose bid has been accepted at the auction fails to furnish the requisite security deposit or fails to complete within stipulated time the required formalities the Collector may sell the contract immediately or on any subsequent date fixed by him

(8)(b) The defaulting purchaser shall be debarred from bidding for the same or any other licence within the period of five years from the date of default and may with the prior sanction of the Collector be prosecuted under S 18 of the Indian Penal Code but in every case the defaulter shall be called upon to show cause why he should not be prosecuted for the said offence before he is actually prosecuted thereunder A consolidated list of dafaulting purchasers along with their addresses debarred under the sub-rule from participating in auction shall be circulated by Excise Commissioner to all the Collectors before the date of auction every year

(9) Where no reason to the contrary exists the highest bid if adequate should be accepted The officer conducting the sales shall however record the reasons for not accepting the highest bid if he accepts the second highest bid All such bids shall however be reported to the Excise Commissioner s decision whether a bid is adequate or not shall be final

(10) When after due weight has given to the foregoing considerations a bid has been finally or provisionally accepted at an auction no subsequent offers in respect of the same engagement should be considered The practice of nominally accepting a bid at the auction and then negotiating privately with other competitors for higher offers is legally indefensible and in all respects objectionable If an adequate price is offered by the highest suitable bidder it should be accepted otherwise the licence should be withdrawn for resale at a subsequent date or for settlement by tender Competitors must be given to understand that when a bid is once accepted the matters cannot be accepted reopened and that they must be prepared to go to the full extent they propose to offer before the close of the auction

12 The next relevant provision is paragraph 373 of the Oanual which contains general conditions as to auction of liquor Suffice it to say that paragraph 373 of the Manual also contains conditions as to auction and the consequences of default in payment of licence fee etc similar and identical to those contained in paragraph 368 General rules for conducting sales are enumerated in paragraph 374 of the Manual

13 Another important thing worthy of being extracted here for proper appreciation of the case is condition No 4(b) of the conditions notified at the auction A copy of the general condition of auction as notified has been filed as Annexure I to the supplementary counter affidavit Paragraph 4(b) being germane to the controversy raised in the case is quoted below

"Yadi Dukan Ek Samooh Me Neelam Ki Jati he Aur Bad Me Kisi Karanvash Samooh Ki Koi Dukan Band Ki Jati He To Ukt Band Ki Gai Dukan Ke Anugyapan Shulk Ke Bhuktan Ka Uttardayitva Us Anugyapi Ka Hoga Jiske Nam Me Samooh Ge Neelam Ki Gai Dukano Ki Antim Boli Swikrat Hui Ho"

14 The grant of exclusive or other privileges in respect of foreign liquor within the meaning of S 24A of the Act is subject to the provision of S 31 The Act is a complete Code in itself relating to import export transport manufacture, sale and possession of intoxicating liquor and intoxicating drugs We cannot possibly go outside the provision of the Act and the Excise Manual to determine the rights and liabilities of the parties in the matters relating to grant of exclusive privilege to sell liquor on the authority of relevant licence issued in accordance with law The principles of Indian Contract Act in so far as they are not in tune with the provisions of the Act and of the U P Excise Manual are impliedly and necessarily excluded for it is well settled that a matter covered by Special Law is regulated by such Law and the general law is necessarily excluded in so far as the matter is covered by the Special Law

15 That the rules extracted hereinbefore are of statutory character was not disputed before us at the bar An analysis of these rules and conditions of auction sale makes it amply clear that a bidder by offering a bid which is provisionally accepted incurs the liability to pay the excise revenue recoverable as arrears of land revenue under S 39 of the Act in terms of the rules and conditions of auction sale referred to hereinbefore and such liability is independently of any contractual obligation arising out of valid contract which may come into existence upon the bid being finally sanctioned by the Excise Commissioner Although the final acceptance of any bid is subject to the sanction of the Excise Commissioner the power to grant or refuse sanction is not arbitrary It is regulated and controlled by the object and purpose of the Act and the guidelines prescribed in this regard in the rules referred to hereinbefore A bidder whose offer is provisionally accepted can challenge the order refusing the sanction on the ground of the order being arbitrary and violative of Art 14 of the Constitution of India Thus a bidder whose bid is provisionally accepted not only incurs certain liabilities both Civil and Criminal (as per sub-para 3(1) of paragraph 374 of the Manual) in the event any breach being committed by him of the conditions as to payment of the licence fee in terms of the rules and conditions of auction sale referred to above but he also acquires the right of his bid being finally sanctioned by the Excise Commissioner in terms of these very rules and conditions read with Art 14 of the Constitution The liability and the right referred to above arise and flow also from the statutory rules and conditions of sale and are quite independent of rights and liabilities flowing and arising out of a concluded contract between the parties The first contention of the learned counsel for the petitioners is in our opinion misconceived

16 The learned counsel for the petitioner has cited the Supreme Courts decision in Union of India v Bhimsen Walaiti Ram, AIR 1971 SC 2295 in support of his contention In the said case an auction for a country liquor shop was held in pursuance of the conditions of Auction of Excise Shops in Delhi for the year 1949 50 Cls 21 22 31 and 33 of R 5 34 of the relevant Rules in the said case were as under (at page SC 2296 AIR 1971) —

Clause 21 of Rule 5 34

A person to whom a shop has been sold shall pay one sixth of the annual fee within seven days of the auction (any deposits already made shall be credited to this sum and any excess shall be either returned to him or credited to future payments) By the 7th of the month in which he begins his business under his licence and by the 7th of every subsequent month the licensee shall pay one twelfth of the annual fee till the whole fee is paid But he may at any time pay the whole amount due if he wishes If the total amount due is less than Rs 100 it shall be payable in one sum unless the Collector for special reasons allows payment to be made in instalments If any person whose bid has been accepted by the officer presiding at the auction fails to make the deposit of one sixth of the annual fee or if he refuses to accept the licence, the Collector may resell the license either by public auction or by private contract and any deficiency in price and all expenses of such resale or attempted resale shall be recoverable from the defaulting bidder in the manner laid down in S 60 of the Punjab Excise Act I of 1914 as applied to the Delhi Province

Clause 22

"When a licence has been cancelled the Collector may resell it by public auction or by private contract and any deficiency in price and all expenses of such resale or attempted resale shall be recoverable from the defaulting licensee in the manner laid down in S 60 of the Excise Act as applied to the Delhi Province

Clause 31

The Chief Commissioner is under no obligation to grant any license until he is assured of financial status of the bidder At the conclusion of the auction an enquiry will be made into the financial position of any bidder not known to the Excise staff and any such bidder shall if necessary be called upon to furnish security for the observance of the terms of his licence as required by sub-sec (2) of S 34 of the Punjab Excise Act I of 1914 as extended to Delhi Province

Clause 33

"All final bids will be made subject to the confirmation by the Chief Commissioner who may reject any bid without assigning any reasons If no bid is accepted for any shop the Chief Commissioner reserves the right to dispose it of by tender or otherwise as he thinks fit

17 According to the rules made under the Act as contained in the U P Excise Manual a prior confirmation of bid is not a condition precedent for the deposit of the requisite advance instalment amounting to one fourth of the bid money as contemplated by sub-rule (8) of R 6 of paragraph 368 of the Oanual The rules under the U P Excise Act are different from that of the Rules under the Punjab Excise Act 1 of 1914 as extended to the Delhi Province In the present case the bid was not only provisionally accepted but the petitioners deposited the advance money obtained licence and transacted business on that basis and the bid was also sanctioned by the Excise Commissioner on 13-6 80 Having transacted business on the basis of the licence granted in their favour, the petitioners cannot be permitted to wriggle out of their liabilities envisaged under R 6(11) of paragraph 368 of the Manual and by paragraph 4(b) of the general conditions of the auction of which the petitioners do not dispute prior notice and full knowledge The petitioners would be held to their bid in terms of para 4(b) supra apart from being liable to pay the licence fee under R 6(11) of para 368 of the Excise Manual The accrual of liability under condition No 4(b) or under R 6(11) of para 368 was not dependent upon sanction of the bid by the Excise Commissioner It is true that para 368 as quoted above was with effect from 5 5-84 but the last part of R 6(11) only prescribes a mode of recovery hence it is procedural in nature and therefore can be relied on for the substance of the recovery as arrears of land revenue and we can take notice of the amended provision

18 Next authority relied upon by the learned counsel for the petitioners in support of his first contention is State of U P v Kishori Lal AIR 1980 SC 680 (1980 All LJ 278) In this case the highest bidder Kishori Lal did not at all deposit one sixth of the bid money as required under para 357 of the Excise Manual and the two groups of shops for which he had offered the highest bid had to be resold The re-sale fetched lesser amount and the short fall was sought to be recovered by means of a suit which was decreed by the trial Court, but on appeal the High Court dismissed the suit holding that there was no valid contract, which could be enforced by the plaintiff as the requirements of Art 299(1) of the Constitution had not been complied with The State of U P went up in appeal by certificate to the Supreme Court and the Supreme Court held that so far as the liability to pay excise revenue under R 357 of the Excise Manual is concerned it could not be enforced because the said rule had no statutory force for want of its publication under S 77 of the Act The Supreme Court held that since R 357 was not published under S 77 of the Act, it must be held that there was no law under which the bidder could be asked to make amends for the short falls The majority judgment of the Supreme Court, further held that no concluded contract came into existence in accordance with the requirements of Art 299(1) of the Constitution of India and therefore the State was not entitled to recover the amount on the ground of alleged breach of contract as well In the instant case as already noticed above not only the initial deposit was made by the petitioner but they obtains the licence and transacted business on that basis Their request contained in the letter dated 18 5 90 appears to have been waived by them in view of their subsequent conduct in depositing the amount in terms of paragraph 642 of the Excise Manual and in obtaining the requisite license and transacting business on that basis This application was also not relied on in the main writ petition So far as the request contained in telegram dated 8 6 80 is concerned, it too was rejected, vide order

dated 19 6 90 a copy of which has been annexed as Annexure 2 to the counter affidavit However neither the letter dated 18 5 80 nor the telegram dated 8 6 80 could absolve the petitioners of the liability fastened upon them in terms of R 6(11) of paragraph 368 of the Excise Manual and Cl 4(b) of the conditions of sale extracted hereinbefore

19 The learned counsel for the petitioners then cited two Division Bench Decisions of this court One in the case of Udai Bhan Jaiswal v State of U P reported in 1983 UPTC 436 and the other in the case of Dhumman Ram alias Badri Prasad v State of U P reported in 1979 UPTC 1033 1979 Tax LR 2451 In Udai Bhan Jaiswal's case the shop was run for three months on the basis of the provisional licence A murder took place in the locality whereafter the State authorities did not permit the licensee to run his shop and ultimately he was directed to shift his shop to another place which he declined and withdrew from the licence due to change in the conditions of licence The Division Bench held that the licensee was not at fault and he could not perform his part of contract due to any fault on his part and therefore, he could not be held for the licence fee or the short fall

20 In Dhumman s case a Division Bench of this Court held that a loss due to withdrawal by licensee before acceptance of bid by the Excise Commissioner and consequential resale is not excise revenue being not an amount due on account of a concluded contract and therefore it was not recoverable under S 39 of the Act The Division Bench in Dhumman s case has not examined the liability of the licensee of that case arising on the basis of statutory rules such as the one contained in R 6(11) of para 368 of the Excise Manual read with condition No 4(b) as already quoted here in before These decisions too do not help the petitioners

21 The learned counsel for the petitioner also placed reliance upon the case of Excise Commissioner U P v Ranjeet Singh Gujral 1984 EFR 210 (AIR 1983 SC 1056) In this case the bids were not even provisionally accepted inasmuch as the Deputy Commissioner of Excise Allahabad in his report dated 26th March 1983 had submitted that the bids were low and would result in a loss of revenue to the Government if accepted On the basis of the said report the Excise Commissioner had cancelled the auction on 28 3 83 Thus, neither the bid was provisionally accepted nor any licence was issued nor any business was transacted in the said case and therefore in our opinion this authority too is of no assistance to the petitioners There does not appear to be any such condition in Ranjeet Singh s case (supra) as condition No 4(b) notified in the present case

22 In State of Haryana v Jage Ram, AIR 1980 SC 2018 the Supreme Court held that the High Court was in error in entertaining the writ petition for the purpose of examining whether the respondent could avoid their contractual liability by challenging the rules under which the bids offered by them were accepted and under which they become entitled to conduct their business It cannot ever be that a licensee can work out the licence if he finds it profitable to do so, and he can challenge the conditions under which he agreed to have the licence, if he finds it commercially in expedient to conduct his business In view of this assuming for the sake of argument that no concluded contract came into existence the petitioners were still liable in terms of paragraph 4(b) of the general conditions of auction as notified to all concerned at the time of auction The writ jurisdiction is not a forum to be invoked for avoiding such a liability

23 The scheme of the Act and the rules contained in the U P Excise Manual do contemplate that a bidder shall be held to his bid and he cannot be permitted to wriggle out of his liability under the general conditions of auction as notified at the time of auction and as contained in paragraphs 368 373 374 of the Excise Manual Such liability can be enforced independent of any contractual liability S 39 of the Act postulates recovery of all excise revenue including all amounts due to the Government by any person on account of any contract relating to the excise revenue as arrears of land revenue The expression Excise Revenue has been defined in S 3(1) of the Act to mean revenue derived or derivable from any duty fee tax fine (other than a fine imposed by a Court of law), or confiscation imposed or ordered under the provisions of the Act, or any other law for the time being in force relating to liquor or intoxicating drugs The bid offered in the present case was by way of a licence fee for grant of privilege This was recoverable from the petitioners as arrears of land revenue under S 39 of the Act on the basis of their liability under the rules and the conditions of auction set out here-in-before irrespective of whether or not a concluded contract came into existence The rules provide that every person bidding will be held to his bid and such bid shall remain valid till the final decision of the Excise Commissioner or for a period of 60 days whichever is earlier Further the expression all monetary losses resulting from re auction or alternative arrangement or from the licences remaining unsold occurring in paragraph 368(11) of the Manual is wide enough to cover all gamuts of losses resulting in revenue on account of default of a bidder in the payment of licence fee whose bid is provisionally accepted The highest bidder can be relieved of this liability only in the event of his bid being not finally sanctioned by the Excise Commissioner, not due to the faults of the bidder but due to the reasons affecting revenue or other considerations found relevant by the Excise Commissioner for the purpose of not sanctioning the bid

24 In the State of Haryana v Lal Chand AIR 1984 SC 1326 the Supreme Court held that the writ jurisdiction of the High Court is not intended to facilitate avoidance of obligation voluntarily incurred The Supreme Court in the said case further held that one of the important purposes of selling exclusive right to vend liquor in whole-sale or retail, is to raise revenue It went on to hold that the licence fee is a price for acquiring such privilege and one, who makes a bid for the grant of such privilege with full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of the contractual obligation arising out of the acceptance of the bid

25 In State of Haryana v Lal Chand (supra) the Supreme Court has held that Art 299(1) of the Constitution does not apply to a case where a particular statutory authority as distinct from the Union or the States enters into a contract which is statutory in nature Such a contract even though it is for securing the interest of the Union or the States is not a contract which has been entered into by or on behalf of the Union or the States in exercise of its executive powers

26 When a bidder offers a bid knowing it fully well that under the rules if his bid is provisionally accepted he will have to deposit the advance licence fee that the fall of the hammer in his favour as contemplated by the rules and will also be liable to damages in the event of non payment of the advance instalment or any other instalment He binds himself to the conditions by mere fact of entering into the area of the auction by offering a bid and he cannot be allowed to wriggle out of the aforesaid binding obligation

27 The second contention on behalf of the learned counsel for the petitioner is that the amount sought to be recovered, is not recoverable as arrears of land revenue under S 39 of the Act being not an amount due on

account of a concluded contract This contention of the learned counsel for the petitioners is again mis conceived inasmuch as S 39 of the Act visualises recovery of all excise revenues including all amounts due to the Government by any person on account of any contract relating to the excise revenue Here, as we have already set out above, the licence money offered by the petitioners was in the nature of excise revenue and the petitioners were bound to pay the licence money, even if it be held that no concluded contract came into being The liability of the petitioners to pay the balance of the excise revenue accrues as we have said above, on the basis of the statutory rules and for the accrual of this liability existence of a concluded contract was not necessary The second clause of S 39 beginning from the words "in the case of default made by holders of a licence confers a discretion upon the Collector to take back the grant for which the licence was given and put it under an alternative management at the risk of the defaulter or to declare the grant forfeited and resell at the risk or loss of the defaulter The Collector is not bound to take recourse to this alternative contemplated by S 39 of the Act He may proceed to recover the balance of the licence money from the defaulter in terms of paragraph 368(11) read with condition No 4(b) referred to herein before The second contention too raised on behalf of the petitioners is therefore untenable

28 Now coming down to the third and the last contention raised on behalf of the petitioners, the learned counsel submitted that the department being liable to re-auctioning the shop in the event of default being committed by the petitioners in the payment of instalments and having failed to do so, was not entitled to recover the balance of the licence fee, inasmuch as that it is well settled that anyone who claims damages must mitigate damages The contention of the learned counsel is that had the department re-auctioned the shop, it is quite possible that there would not have occurred any short fall or in any event the difference would have reduced. Necessary foundation in relation to this contention have not been laid in the writ petition Nowhere in the writ petition it is alleged that the shops could not be re-auctioned due to the fault of the department On the contrary, it is specifically averred in paragraph 9 of the counter affidavit to the following effect

> "That the petitioners were informed in reply to the telegram that under existing rules they could not surrender their F L 2 licence for Ranikhet without depositing the entire amount of Rs. 2 65 000/ of the auction bid for Ranikhet They were also informed that the re-auction of the said shop will be done at their risk and if the bid in the re-auction be less than Rs 2 65 000/ the difference will be deducted from the amount deposited by them towards the Government account and they will be entitled to receive the remaining amount only and as such they were directed to deposit the entire bid amount in the treasury within three days so that their request be considered accordingly but the petitioners failed to act according to the instructions issued to them in Annexure-2 referred to above On the contrary the petitioners in view of the prospects of their business were not in favour of re-auction of Ranikhet F L 2 shop as they wanted to maintain their monopoly in Almorah district as the sole F L 2 licensee In fact they wanted to abolish Ranikhet F L 2 shop thereby conducting the entire business from Almorah town and thus wanted to save the licence fee for Ranikhet shop for which they had themselves offered the bid of Rs. 2 65,000/ at the time of auction

It is thus evident that the department cannot be said to be at fault. The respondents were entitled to recover the entire amount of licence fee offered by the petitioners in terms of R 6(11) of paragraph 368 read with condition 4(b) Thus the third contention of the petitioners too is devoid of any merit and cannot be sustained

29 In the result, the petition fails and is dismissed with costs on parties The interim order dated 22 10 80 is hereby discharged The petitioners are allowed one month's time to deposit the amount sought to be recovered in the impugned recovery proceedings, failing which the respondents shall be at liberty to proceed with the recovery of the amount in accordance with law

Petition dismissed

1991 ALL L J 776

K P SINGH AND P P GUPTA JJ

Smt Gyan Devi (deceased by L R) and ors Appellants v The Collector Agra and another Respondents

First Appeals Nos 586 587 and 641 of 1985 D- 16 4 1991 *

(A) U P Avas Evam Vikas Parishad Adhiniyam (1965), S 66 — Appeal — Acquisition of land under Land Acquisition Act, as modified by Schedule to Adhiniyam — Award by Special Tribunal — Appeal against — Maintainable in view of S 66(1) — S 66(2) not attracted

Land Acquisition Act (1894), Ss 54, 4, 6

An appeal against an award of the Tribunal will be only if it relates to a land acquired under the Act as modified by the schedule of the Adhiniyam In the instant case notification under S 28 of the Adhiniyam has been substituted for notification under sub-sec (1) of S 4 of the Act and notification under S 32 is substituted in place of notification under S 6 of the said Act in the schedule of the Adhiniyam Hence the impugned award of the Special Tribunal in the appeal relates to the acquisition of land under the Act, as modified by the schedule to the Adhiniyam and so, in view of sub-sec (1) of S 66 of the Adhiniyam an appeal lies against such an award The provisions of sub-sec (2) are not attracted (Paras 10 11)

(B) Land Acquisition Act (1894), S 23 — Award — Grant of compensation — Court should not bind down person interested to limit relief, which is claimed by him

In a reference application, the person interested need not claim any fixed amount of compensation It is enough if he raises objection against the award, saying that the award given by the Collector is not acceptable The question of determination of appropriate compensation thereafter lies within the domain of the Civil Court, after a reference is made by the Collector Therefore the courts should not bind down the person to the limited relief, which is claimed by him Whatever relief a land holder is entitled to in law, the same should be allowed to him irrespective of the claim made by him and such compensation is to be determined in accordance with the provision of S 23 of the Act taking into consideration the market value of the land at the date of the publication of the notification under sub section (1) of S 4 of the Act S 18 is a clear departure from S 9 of the Act. By S 9 the claimant is required to state before the Collector the specific amount which he claims as compensation for his interest in the land acquired There is a significant omission of such requirement in S 18 Therefore all that a person interested has to do is to state in his application for reference that he objects to the amount of compensation awarded and it is not incumbent upon him to state whether he claimed compensation at a particular rate (Paras 15, 19, 21, 22)

Cases Referred Chronological	Paras
AIR 1990 SC 981	34, 36
AIR 1990 SC 2192	35
(1990) 2 SCC 625 (1990) 2 JT 567	35, 37
AIR 1985 SC 1576	18
AIR 1985 Cal 39	27
AIR 1983 SC 43	20A
AIR 1981 All 92	20A
AIR 1980 SC 1438	34
AIR 1980 All 324	27 32

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*AAgainst judgment and decree of H C Rastogi Presiding Officer U P Avas Evam Vikas Parishad Tribunal, Agra, D/ 28 6 1985

AIR 1979 SC 869	26 32
AIR 1974 SC 1202	34
AIR 1973 SC 689	34
AIR 1971 SC 465	27
AIR 1966 All 227	9
AIR 1945 Cal 312	17
AIR 1943 Mad 337	15
AIR 1933 Cal 25	27

K. C Jain and Dilip Gupta, for Appellants Standing Counsel, for Respondents

P P GUPTA — This judgment shall dispose of all the three appeals as they arise out of a common award of the Presiding Officer U P Avas Evam Vikas Parishad Tribunal Agra, (hereinafter referred to as 'the Tribunal') dated June 28, 1985 By the award under challenge the market value of the acquired land of all the appellants has been fixed at Rs 16 54 P per sq yd , as against their claim at Rs. 25/ per sq yd

2 The brief facts giving rise to these appeals are that the U P Avas Evam Vikas Parishad (hereinafter referred to as the Parishad notified under S 28 of the U P Avas Evam Vikas Parishad Adhiniyam, 1965 (hereinafter referred to as the 'Adhiniyam') a scheme called Trans Yamuna Griha Asthan and Sarak Yojna, Agra It was a combination of a housing accommodation scheme and a street scheme This improvement scheme was framed for acquisition of land for providing land for houses streets and for general improvement The finalised scheme was published under S 32 of the said Adhiniyam

3 In the scheme apart from other land the land in question belonging to the three appellants situate in village Naraich Mustaquil Tahsil Edmadpur, District Agra was also included

4 An award under S 11 of the Land Acquisition Act (hereinafter referred to as the Act) was made by the Special Land Acquisition Officer who adopted belting system for determining the market value and divided the land covered by the award into three belts fixing different amount for each belt

5 Being dissatisfied with the award of the Special Land Acquisition Officer, applications for reference under S 18 of the Act were moved for referring the matter to the Tribunal. The Special Land Acquisition Officer made three references under S 18 of the Act The Tribunal consolidated all the references and disposed them of with a common award, which is in dispute in these three appeals Besides allowing other reliefs to the appellants, regarding solatium interest, etc , the Tribunal determined the market value of the acquired land in all the three references at Rs 16 54 P per sq yd as against the claim of each of the appellants at Rs 25/- per sq yd

6 Feeling aggrieved by the said award, the appellants have filed the appeals before this Court under the provisions of S 54 of the Act

7 The learned standing counsel for the State and also Sri K C Jain Advocate, assisted by Sri Dilip Gupta Advocate, appearing for the appellants, were heard at length and the record of the case including the impugned award was perused

8. The learned standing counsel for the State raised a preliminary objection regarding maintainability of these appeals Basing his submission on S 66 of the Adhiniyam, it was submitted that these appeals are not maintainable The said S 66 of the Adhiniyam is reproduced below —

"66 Finality of decisions of Tribunal —

(1) An award of the Tribunal in a case relating to the acquisition of land under the Land Acquisition Act, 1894 (Act No I of 1894), as modified by the Schedule to this Act, shall be deemed to be an award of the Court under that Act and shall, subject to the provisions of S 54 of that Act, be final

(2) Any other decision of the Tribunal under this Act shall be final

9 It may be mentioned here that whereas the word Award has been used under S 54 of the Act, the word decision has been used

in S. 381 of the Nagar Mahapalika Adhiniyam, which as held by this Court in the case of Aijaz Uddin v. T. O. High Court, AIR 1966 All 227, will include an Award as given by the Nagar Mahapalika Tribunal.

10. It is significant to note that whereas in sub-sec. (1) of S. 66 the word 'award' has been used the word 'decision' has been used under sub-sec. (2). Against the award of the Tribunal, an appeal is provided under S. 54 of the Act. But against any other decision of the Tribunal no appeal is provided and the decision of the Tribunal has been made final. Since the Legislature has used two different words in two sub-sections of the same Section, it cannot be said that they have been used inadvertently or in ignorance. They must have been used intentionally. An analysis of this Section, therefore, leads to the conclusion that whereas an award of the Tribunal is appealable under S. 54 of the Act, no appeal lies against any other decision of the Tribunal. Since, instead of making a separate provision for appeal, sub-sec. (1) of S. 66 provides that an appeal will lie under the provisions of S. 54 of the Act, it has been clarified that such an appeal will lie only against an award of the Tribunal in a case relating to the acquisition of land under the Act, as modified by the schedule to the Adhiniyam. It is, therefore, clear from these provisions that an appeal against an award of the Tribunal will lie only if it relates to a land acquired under the Act as modified by the schedule of the Adhiniyam.

11. In these appeals there is no dispute that initial notification in respect of the land in question was issued under S. 28 of the Adhiniyam which corresponds to a notification under S. 4(1) of the Act. It was followed by another notification under S. 32 of the said Adhiniyam, which corresponds to a declaration under S. 6 of the Act. These, inter alia, are some of the modifications in the provisions of the Act made by the schedule of this Adhiniyam. To clarify, notification under S. 28 of the Adhiniyam has been substituted for notification under sub-sec. (1) of S. 4 of the Act and notification under S. 32 is substituted in place of notification under S. 6 of the said Act in the schedule of the Adhiniyam. Hence the impugned award of the Tribunal in these three appeals relates to the acquisition of land under the Act as modified by the schedule to the Adhiniyam and so in view of sub-sec. (1) of S. 66 of the Adhiniyam, an appeal lies against such an award. The provisions of sub-sec. (2) are not attracted. Hence, the preliminary objection raised on behalf of the respondents is devoid of any force and is hereby repelled. Accordingly it is held that the appeals, filed by the appellants, are maintainable under S. 66(1) of the Adhiniyam.

12. It was next urged on behalf of the respondents that the appellants had initially confined their claim to compensation in their reference at Rs. 15/- per sq. yd. only. The Tribunal has enhanced it to Rs. 16.54 P. per sq. yd., which was more than the amount claimed by the appellants themselves. Therefore, the appellants are not entitled to more than what has already been awarded to them mistakenly by the Tribunal.

13. The learned counsel for the appellants submitted that by an amendment in their written statement, each of the appellants claimed market value at the rate of Rs. 25/- per sq. yd. This amendment was allowed by the Tribunal and was duly incorporated in the written statements. The objection raised on behalf of the respondents that the appellants had confined their claim to compensation at Rs. 15/- per sq. yd. only has, therefore, no force.

14. Under sub-sec. (1) of S. 23 of the Act, a duty has been cast on the Court to determine the market value of the land acquired as it was at the date of publication of the notification under S. 4 sub-sec. (1). The person, whose land is acquired, is entitled to this market value. Any person interested, who has not accepted the award, as given by the Special Land Acquisition Officer, has been given a right to make request for a reference to Court under S. 18 of the Act. This reference is to be made by a written application which must state the grounds on which objection to the award is taken The application is to be given to the Collector requiring that the matter be referred by him for determination of the Court S 18 of the Act specifies four matters which can be the subject matter of a reference to the Court by the Collector They are —

(1) Objection to the measurement of the land

(2) Objection to the amount of compensation

(3) objection to the person to whom it is payable and

(4) objection to the apportionment of the compensation amongst the person concerned

This application to the Collector should be moved within six weeks or the limitation as prescribed thereunder from the date of the Collector s award

15 Since the application is made to the Collector for seeking reference to the Civil Court, no prayer can be made for the grant of a particular amount of compensation to the Collector Even if such a prayer is made and even if the Collector is agreeable about the grant of request of the person interested, he cannot simply grant that amount of compensation to the claimant. He becomes functus officio after pronouncing the award Thereafter it is only the Civil Court which can determine the questions contemplated within the meaning and ambit of S 18 of the Act In a reference application, the person interested need not, therefore, claim any fixed amount of compensation It is enough if he raises objection against the award saying that the award given by the Collector is not acceptable The question of determination of appropriate compensation thereafter lies within the domain of the Civil Court, after a reference is made by the Collector The equitable view, therefore, appears to be that the courts should not bind down the person to the limited relief, which is claimed by him Whatever relief a land holder is entitled to in law, the same should be allowed to him irrespective of the claim made by him and such compensation is to be determined in accordance with the provision of S 23 of the Act taking into consideration the market value of the land at the date of the publication of the notification under sub-sec (1) of S 4 of the Act. S 18 is a clear departure from S 9 of the Act By S 9 the claimant is required to state before the Collector the specific amount which he claims as compensation for his interest in the land acquired. There is a significant omission of such requirement in S 18 Therefore, all that a person interested has to do is to state in his application for reference that he objects to the amount of compensation awarded and it is not incumbent upon him to state whether he claimed compensation at a particular rate In view of this, the amendment sought by the appellants and allowed by the Tribunal was clearly unnecessary as has been held in re Raja Jagaveera Rama Muthu Kumara Venkateswara Ettappa Naicher Ayyan Avergal Zamindar of Ettayapuram. AIR 1943 Mad 337

16 If, however an amendment in the application for reference is considered necessary, there is no bar under the Act not to entertain it The Court hearing a reference made under S 18 of the Act is a Court of special jurisdiction which acquires jurisdiction only on a reference being made by the Collector The jurisdiction so acquired by the Court extends over the matters referred to it by the Collector under S 18 and to no other matters Within the sphere of its jurisdiction it must follow the provisions of the Civil Procedure Code, unless any one of those provisions is inconsistent with the provisions of the Act As there is no provision in the Act inconsistent with the provisions of O 6 R 17, C P C the Court having jurisdiction has the power to allow the reference petition to be amended, subject to the limitation that it cannot allow an amendment which would have the effect of introducing a new matter which has not been referred to it for decision by the Collector under S 18 of the Act

17 In the case of Province of Bengal v P L Nun AIR 1942 Cal 312 the question arose whether an amendment substituting larger sum than the sum claimed in the reference could be allowed An argument against the amendment was raised that the sum claimed was an essential element — an integral part — of the matter under reference and so a change in that figure would make the matter of the reference quite different from the matter originally referred to the Court and so the Court below had no jurisdiction to allow the amendment While upholding that such an amendment can be allowed the Court observed" A reference petition would be quite in order, even if no amount is mentioned therein, where the reference raises an objection to the amount of compensation awarded by the Collector " Accordingly it was held that the Court hearing a reference made under S 18 of the Act has the power to allow an amendment of the nature that has been allowed in this case A contrary view would lead to irrational results and would work injustice, for in that case the Court would be powerless to direct amendment even when the mistake in the petition of reference was due to an accidental slip "

18 The Hon'ble Supreme Court has gone to that extent that even if a citizen has claimed lesser amount that it would be quite just and legitimate to award him any higher amount than that claimed In the case of Bhag Singh v Union Territory of Chandigarh, AIR 1985 SC 1576 the Supreme Court has observed that It must be remembered that this was not a dispute between two private citizens where it would be quite just and legitimate to confine the claimant to the claim made by him and not to award him any higher amount than that claimed through even in such a case there may be situations where an amount higher than that claimed can be awarded to the claimant " To deny this benefit to the appellants would tantamount to permitting the State Government to acquire the land of the appellants on payment of less than the due market value Where land is acquired under the Land Acquisition Act, 1894, it would not be fair and just to deprive the holder of his land without payment of the market value when the law in so many terms declares that he shall be paid such market value The State Government must do what is fair and just to the citizen and should not take up a technical plea to defeat the legitimate and just claim of the citizen "

19 Hence, an amendment in an application for reference, subject to the above limitations, is permissible under the law The objection raised on behalf of the respondents is therefore devoid of any force

20 It was next argued on behalf of the respondents that the amendment application was moved beyond six weeks from the date of the Collector's award and so a valuable right vested in the State of U P which cannot be divested by allowing an amendment in the rate of compensation, as claimed earlier in the written statement.

20A So far as the question whether amendment could be allowed after the expiry of the period of six weeks from the application moved before the Collector for making a reference to the Civil Court, the Hon'ble Supreme Court, in the case of Harcharan v State of Haryana, AIR 1983 SC 43, has held that in a land acquisition case, the application for amendment of memo of appeal seeking higher compensation on the allegation that acquired land had potentiality of building site submitted after a lapse of six years of filing of appeal should have been allowed by the appellate Court A learned single Judge of this Court has in the case of Zameer Ahmad v State of U P AIR 1981 All 92, also allowed an application for amendment, moved after considerable delay, by which enhanced amount of compensation as against lesser amount claimed was allowed

21 As a result of the above discussion, it becomes obvious that a person interested, whose land has been acquired under the Act, need not claim a specific amount as compensation He has simply to state that the

award made by the Special Land Acquisition Officer is not acceptable to him. This is exactly what the appellants had done in these cases In their applications for references the appellants made the following prayer —

"It is therefore prayed that the matter may kindly be referred for grant of adequate compensation to the Avas Evam Vikas Tribunal Agra

22 This prayer was sufficient compliance of the provisions under the Act It was not necessary for the appellants to have claimed any specific amount of compensation It was the duty of the Tribunal to award, in view of S 23 of the Act the market value of the land, as it existed on the date of notification under S 4(1) of the Act It would, therefore hardly matter that the appellants restricted their claim for compensation at a lower rate while the market value was higher The appellants however took precaution in seeking amendment in their prayer by which they claimed the market value The said amendment was allowed by the Tribunal though it was not necessary In the circumstances it cannot be said that because the appellants had claimed compensation at a lesser rate they cannot be allowed compensation at a higher rate which is the market value of the land acquired The second objection therefore has also no merit

23 Now coming to the question of compensation payable to the appellants, we find that the Special Land Acquisition Officer had divided the acquired land of the appellants into three belts and different rate for each belt was fixed The Tribunal however awarded compensation at a flat rate of Rs 16 54 P per sq yd

24 It is an admitted case that under the same scheme land falling both in the North as well as in the South of the by pass connecting Mathura Road in the West with old Agra Firozabad Kanpur Road in the East was acquired For the land lying in South of the by pass compensation at the rate of Rs 16 54 per sq yd was allowed by the Tribunal. It was argued that the land lying in the South of the by pass was inferior in quality and was uneven having pits etc as compared to the land in question therefore the learned Tribunal has erred in awarding the compensation for the impugned land at the same rate allowed for the land lying in the South of the by-pass

25 In this connection our attention was drawn to the statement of the Lekhpal. Ramesh Chand (D W 1) who has specifically admitted that the land involving in all the three cases is even He has further, stated that this land as compared to the land lying in the South of the by pass is better and at a higher level He has further clarified it by saying that the land lying in the South, which was also acquired under the same Yojna is lower in level and has pits The Tribunal has also accepted this evidence which was laid on behalf of the respondents themselves, and has held that the land lying in the South of the by pass, which was also acquired under the same scheme is inferior in quality and is also lower in level having pits than the land in question It is therefore abundantly established from the respondents own evidence that the land in question is of a better quality higher in level, and is even Therefore the market value of the land in question will be more than the market value of the land lying in South of the by pass The Tribunal has erred in allowing market value for the land in question at the same rate which the Special Land Acquisition Officer has determined for the land lying in South of the by pass vide Ex 1 and Ex 2

26 At this stage it is important to note that in the case of Krishna Yachendra Bahadurvaru v The Special Land Acquisition Officer City Improvement Trust Board, Bangalore, AIR 1979 SC 869 it has been held that for the purpose of deciding what compensation should be awarded to the appellants in respect of the present acquisitions made under the two notifications, the awards which have become final afford the clearest evidence for determining the compensation awardable to the appellants in respect of the present two acquisitions. So where the land under the same Yojna has been acquired and an award in respect of the same land has become final, that award will afford the clearest evidence for determining the compensation awardable to the other interested persons whose land have been acquired under the same Yojna. Therefore the award of the Tribunal regarding acquired land falling towards the South of the by pass will be the best and safest evidence for determining the compensation awardable to the present appellants in respect of their land lying in the North of the by pass. In the circumstances, when the land in question is of better quality, higher in level and even as compared to the land lying in South of the by pass, the Tribunal should have fixed the amount of compensation at a higher rate instead of Rs. 16.54 P. which was the rate fixed by the Special Land Acquisition Officer for the inferior land lying in the South of the by pass. So on this count some addition in the market value, as determined by the Tribunal, should be made.

27. Now, coming to the plots inter se under these three appeals, we find that they are not similarly situate. Some of them are just abutting the by pass and others are away from it. In between also there are few other plots. Similarly some plots are in inhabited area and some are away from it. It was for this reason that the Special Land Acquisition Officer adopted belting system in awarding compensation. The belting system of compensation has been followed from a very long time. Far back as in the year 1933 the High Court of Calcutta in the case of Nityagopal Sen Poddar v. Secretary of State, AIR 1933 Cal 25, adopted belting system in allowing compensation. It was observed that "Now so far as the system of belting is concerned, it is a system which is widely used but its value as a system depends much upon a variety of facts. If data are available showing the proportion at which the value of land diminished accordingly as it is situated at a particular distance from a main road or thoroughfore the system would be perfectly scientific. In the absence of any such date also it may be assumed that in big cities where land sells by cottas or yards or feet there is such a proportion as common experience shows." In another case of State of West Bengal v. Musst. Nurjahan Sakil, AIR 1985 Cal 39, the earlier view was reiterated and held considering the above decisions and also the passage referred to hereinbefore of Parks on valuation: "I am constrained to hold that the belting method of valuation that has been adopted by the learned Special L. A. Judge in deciding the reference petition and in determining the valuation of the lands acquired is the appropriate method and there is no error or illegality committed and the finding of the learned Special Land Acquisition Judge that the adoption of the belting method and the extent of land in the respective belts as determined by the Collector could not be challenged by the opposite party as Government was bound by the offer is a correct finding and the same is affirmed." The Hon'ble Supreme Court, in the case of Mathura Prosad Raighbaria v. State of West Bengal, AIR 1971 SC 465, held that where a large area of land in an urban locality is sought to be acquired in determining the market value, the method of belting is appropriate. It is common knowledge that lands having frontage on the main roads in urban area are always more attractive than the lands which have no such frontage. Lastly a reference may be made to a decision of this Court also in the case of Baboo Ram v. State of U. P., AIR 1980 All 324, where the land falling by belts as adopted by the Additional District Judge, was upheld.

28. It, therefore, follows that in cases where there are large number of plots, which are not exactly similar to each other in their nature, situation and their location, building potentiality, nearness to the road, etc. the method of determining the market value by belting system is most appropriate.

29. In the instant case also, as has been said above, we find that some of the plots are just abutting the by pass and some are away

from it while the rest are in between Similarly some of the plots are nearer to the inhabited area having more building potentiality than others In these circumstances looking to the nature and situation of the plots, the Special Land Acquisition Officer was correct in fixing the market value of the acquired land by adopting belting system

30 We are, therefore, satisfied that it is an appropriate case in which the belting system should be adopted for determining the exact market value of the land in question

31 Now the question arises as to at what rate the compensation for the plots in different belts should be fixed

32 In determining the market value guess work and conjectures are permissible, as has been held in the case of Krishna Yachendra Bahadurvaru AIR 1979 SC 869 (supra), in the following words (at p 871 of AIR)

"The estimation of market value in many cases must depend largely on evaluation of many imponderables and hence it must necessarily be to some extent a matter of conjecture or guess "

This Court in the case of Baboo Ram (AIR 1980 All 324) (supra) has also held the same view, which is as follows —

" It is settled that to determine compensation is not an exact science The question of fair compensation is not algebraic problem which could be solved by abstract formula There is an element of guess work inherent in most cases involving determination of market value of the acquired land "

(contd on Col 2)

33 Therefore while determining the market rate of the land falling in each of the three belts some guess work and conjectures will have to be done Taking into consideration the factors such as nearness to the by pass nearness to the inhabited area and superiority in fact in location and also keeping in view the fact that the Tribunal has awarded Rs 16 54 P per sq yd for inferior land lying in the South of the by pass and the rates fixed by the Special Land Acquisition Officer for the land falling in three different belts we are of the view that the rates for the land for each of the three belts as specified by S L O in his award should reasonably be fixed as below —

(See Table below)

It may be clarified here that the rates of the three belts if fixed in the same proportion as were fixed by the Special Land Acquisition Officer, the rates of first and second belts would have been much higher than what we have determined and allowed above

34 So far as the question of solatium is concerned, each of the appellants will be entitled to solatium at the rate of 30% on the amount of enhanced compensation to be calculated as above as held by the Supreme Court in the case of Union of India v Filip Tiago De Gama AIR 1990 SC 981 notwithstanding that the schedule to the Parishad Adhiniyam provides for solatium at 15% only It may be held on the basis of the decisions of the Supreme Court in the following cases viz —

1 Nagpur Improvement Trust v Vithal Rao AIR 1973 SC 689 (2) Om Prakash v State of U P (AIR 1974 SC 1202), (3) State of Kerala v T M Peter AIR 1980 SC 1438,

1	For the land falling in First Belt	Rs 25/- per sq yd
2	' ' Second '	Rs 23 50 "
3	" " " Third "	Rs 20/- ' ' "

that there can be no discrimination in awarding solatium to owners whose land is acquired under the Act as modified by the schedule to the Parishad Adhiniyam

35 Besides solatium the appellants shall also be entitled to interest on the enhanced amount of compensation including solatium which is an essential part of compensation (see the decision of the Supreme Court in the case of Periyar and Pareekanni Rubbers Ltd v State of Kerala AIR 1990 SC 2192) at the rate 9% for the first year from the date of taking possession and at the rate of 15% per annum for the subsequent years, as has been held by the Supreme Court in the case of Hoshiarpur Improvement Trust v President, Land Acquisition Tribunal (1990) 2 SCC 625

36 The appellants have also claimed an amount under sub-section (1)(a) of Section 23 of the Act for period mentioned therein at the rate of 12% per annum In view of the decision of the Hon'ble Supreme Court in the case of Union of India v Filip Tiago De Gama (AIR 1990 SC 981) (supra), the appellants are not entitled to the enhanced amount under Section 28(1)(a) of the Act

37 It was argued before us that the view taken by the Supreme Court in the above case is not correct and requires reconsideration In this connection, it will be sufficient to say that the law declared by the Supreme Court in view of Article 141 of the Constitution of India, is binding on all Courts within the territory of India. Therefore, in view of the direct decision of the Supreme Court on this point, which has been followed by the Supreme Court in Hoshiarpur Improvement Trust's case (1990 (2) SCC 625) (supra) this relief is not admissible to the appellants

38. For the reasons given above all the three appeals are partly allowed with costs throughout Each of the appellants will be entitled to market value, solatium and interest to be calculated in the light of our findings in the body of this judgment.

Appeal partly allowed

1991 ALL L J 784

H C MITAL J

Ram Krishna Das Petitioner v Krishna Das Agarwal Respondent.

Civil Revn No 548 of 1991 D/ 11-4-1991*

(A) U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S 20(2)(c) — Eviction of tenant — Allegation of construction made without written permission of landlord — Landlord not taken objection to construction for 4/5 years — Waiver of written permission can be inferred

Evidence Act (1 of 1872), S 115

1982 All Rent Cas 231, Relied on

(Para 5)

(B) U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S 20(2)(c) — Eviction of tenant — Allegation of construction made in accommodation reducing its value and utility and disfiguring the building — Construction of latrine and bathroom made inside corner of godown for use of customers — Construction not visible from outside — Construction cannot be said to have reduced value and utility and disfigured building

(Paras 6, 9)

(C) Civil P C (1908), S 115 — Eviction of tenant — Question involved is whether changes made by tenant amount to structural alteration within meaning of Section 20(2)(c) of U P Act 13 of 1972 — Not pure question of fact — High Court can consider it in revision

U P Urban Buildings (Regulation of Letting Rent Eviction) Act (13 of 1972), S 20(2)(c).

The question whether the changes made

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*Against judgment and order of Chandra Prakash, 9th Addl Dist. Judge Varanasi. D/ 2-1-1991 by the tenant amount to structural alterations in the building under tenancy within the meaning of Section 21(2)(c) of the Act is not a pure question of fact. The inference whether the construction made by the tenant amounts to structural alterations from the facts established on the record is certainly an inference of law and not of fact Hence the Court in revision is entitled to consider the facts whether the alterations made by the tenant amounted to structural alteration within the meaning of Section 20(2)(c) of the Act

(Para 10)

Cases Referred Chronological	**Paras**
1989 All LJ 93 1989 All WC 103	6
1987 All LJ 184 AIR 1987 SC 617	3
1982 All Rent Cas 231 1982 (UP) RCC 196 (Rel on)	5

S N Singh and A K Rai for Petitioner Kailash Nath Tripathi, for Respondent

ORDER — Both the parties are real brothers The revisionist has been a tenant of the plaintiff of a building in which the business of commission agency is carried on The accommodation has also a big hall being used as a godown In the year 1989 the plaintiff filed a suit against the revisionist with the allegation that he had without any permission in writing in the godown has constructed a room and latrine after taking sewer and water connections and that the floor of the godowns has also been damaged and thereby the value and utility of the accommodation has been diminished and it has also been disfigured On behalf of the revisionist it was alleged in the written statement that with the oral consent of the plaintiff this construction was made, which was absolutely temporary and can be removed at any moment without leaving any trace of it, that neither the utility and value has been reduced nor it has disfigured and, therefore, the suit was liable to be dismissed The learned court below, however, held in favour of the plaintiff hence this revision

2 Counter and rejoinder affidavits have been exchanged between the parties and the revision was heard finally on merits On behalf of the revisionist it was urged that the onus was on the plaintiff to prove besides a written permission in writing of the landlord that such constructions or structural alterations in the building are likely to diminish its value of or utility or disfigure it as provided under Section 20(2)(c) of the U P Act No XIII of 1972 It was further urged that it is necessary that such constructions must be of a permanent nature On the other hand learned counsel for the plaintiff respondent argued that it was not necessary that the constructions as prohibited under Section 20(2)(c) should be of a permanent nature

3 The case of Om Prakash v Amar Singh AIR 1987 SC 617 (1987 All LJ 184) was a case of course under the U P Cantonments (Control of Rent and Eviction) Act 1952 Section 14(c) of that Act provided as follows

S 14 Restrictions on eviction — No suit shall without the permission of the District Magistrate be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds namely

a) to b) x x x x x x x x

c) that the tenant has without the permission of the landlord made or permitted to be made any such construction as in the opinion of the Court has materially altered the accommodation or is likely to substantially diminish its value

Section 20(2)(c) of the U P Act No XLLL of 1972 roads as follows Bar of suit for eviction of tenant except on specified ground

(1) Save as provided in sub-sec (2) no suit shall be instituted for the eviction of a tenant from a building, notwithstanding the determination of his tenancy by efflux of time or on the expiration of a notice to quit or in any other manner

Provided that nothing in this sub-section shall bar a suit for the eviction of a tenant on the determination of his tenancy by efflux of time where the tenancy for a fixed term was entered into by or in pursuance of a compromise or adjustment arrived at with reference to a suit, appeal revision or execution proceeding which is either recorded in Court or otherwise reduced to writing and signed by the tenant

(2) A suit for the eviction of a tenant from a building after the determination of his tenancy may be instituted on one or more of the following grounds namely —

(c) that the tenant has without the permission in writing of the landlord made or permitted to be made any such construction or structural alteration in the building as is likely to diminish its value or utility or to disfigure it

4 It is apparent that the provision regarding construction in the building which may materially alter the accommodation or cause structural alteration in the building as is likely to substantially diminish its value are common in both the aforesaid provisions and therefore the law laid down by their Lordships of the Supreme Court in the aforesaid case though pertaining to S 14(c) of the U P Cantonments (Control of Rent and Eviction) Act 1952 would also be applicable to the U P Act No XLLL of 1972 In that case their Lordships specifically laid down as under

"The nature of constructions whether they are permanent or temporary, is a relevant consideration in determining the question of 'material alteration A permanent construction tends to make changes in the accommodation on a permanent basis, while a temporary construction is on temporary basis which does not ordinarily affect the form or structure of the building as it can easily be removed without causing any damage to the building

It is, therefore necessary that the alleged construction must be of a permanent character In the present case the learned Court below has not given any finding that the alleged construction is that of a permanent nature Its finding is only that the tenant has made construction without the written permission of the landlord and as a result of which it has diminished the utility of the accommodation

5 As regards the permission of the landlord before construction admittedly there has not been any written permission The case of the revisionist however has been that the parties are real brothers and after partition in between them the accommodation in suit came to the share of the plaintiff and the revisionist continued tenant thereof that the alleged construction was made with the oral permission of the landlord and he being his brother any written permission was not necessary The present suit was filed in the year 1989 while according to the statement of the defendant, relied upon by the learned Court below in its judgment, the construction was made in the year 1984 85 since thereafter no objection was raised by the plaintiff except for the first time in the notice dated 19 1 1989, i e after about five years of the construction It was, therefore, urged that from the conduct of the plaintiff respondent it is clear that written permission was waived. The law is well settled as laid down in the case of Niaz Ahmad v The III Addl District Judge Aligarh 1982 All Rent Cas 231 that the waiver of the notice can be inferred from the conduct of the party and the party who had full knowledge of his rights and of facts enabling him to take effectual action for enforcement of such rights It is clear that the parties are real brothers and there is uncontroverted statement of the defendant that the accommodation was built in the year 1984-85 Inspite of that no action was taken for so many years Hence it can be safely inferred that the plaintiff did not press for a written consent for making the constructions

6 Regarding the question whether the constructions in dispute have reduced the utility of the accommodation as alleged On behalf of the respondent it was stated that it is a construction of the bath room and latrine for the convenience of its occupant and so it is also to new other occupant and it has not in any manner reduced the utility or value of the accommodation On the other hand, on behalf of the respondent reliance has been placed in the case of Raja Ram v Chandra Bhan Singh, 1989 All WC 103 (1989 All LJ

931 wherein also they had converted a room into latrine and it was held that the construction had certainly diminished its value and utility In that case two rooms together with a triangular portion including a Chabutara infront thereof was let out to the tenant The triangular portion was let out for running a sweetmeat shop The allegation made in the plaint was that the tenant had constructed a latrine inside the front room of his tenanted portion by digging and damaging the floor of the room and the Chabutara He had also raised a partition wall and other constructions by fixing water pipe, sewer fittings etc Thus the front room was converted partially in the latrine and the other corner part was being used as sweetmeat shop Under those circumstances it was held that conversion of a room into a latrine is clearly a construction which would diminish its value and utility In the present case the front portion has not been converted into a latrine but inside the corner of the godown a small bath room and latrine have been made for the convenience of the customers of the revisionist who is a commission agent and engaged the godown for storing the food grains etc Thus, the facts of the present case and that of the case of Raja Ram v Chandra Bhan Singh (supra) are totally different

7 As regards allegation of the landlord that by making the constructions of the latrine and bath room the building has been disfigured The word disfigure has not been defined in the Act In the absence of any legislative definition of the word, it will be useful to refer to the meaning given in the dictionary Disfigure has been explained in the Webster s dictionary to mean —

'To make less complete perfect or beautiful or deface, deform or disguise by changing the figure or appearance

Now we have to look into the scope of words deface and deform —

deform — to spoil the form or shape of to distort, mar the excellence or perfection

'deface — to destroy or mar the face or external appearance, injure spoil or mar by effecting important features or portions

8 Apart from the dictionary meaning the word disfigure even if given the popular meaning it would mean that it spoils the external appearance of the building This word disfigure has got nothing to do with diminishing its value or utility It is an independent phrase having its separate field of operation It confines only to the limited question that the show of building is spoiled or marred

9 In the present case the landlord himself has admitted that from outside the latrine and the bath room were not visible and hence in that view of his admission it cannot be said that the alleged construction has disfigured the building

10 Before concluding it would not be out of place to refer to the argument raised on behalf of the opposite party that this Court in revision must not interfere with the finding of fact of the Court below The question whether the changes made by the tenant amount to structural alterations in the building under tenancy within the meaning of S 21(2)(c) of the Act is not a pure question of fact The inference whether the alterations made by the tenant amounts to structural alterations from the facts established on the record is certainly an inference of law and not of fact Hence there is no force in this contention that this Court in revision is not entitled to consider the facts whether the alterations made by the tenant amounted to structural alteration within the meaning of S 20(2)(c) of the Act

11 The conclusion, therefore, is that the revision is allowed and the impugned judgment and decree of the learned Court below regarding the eviction of the revisionist from the accommodation in suit are set aside

12 Under the circumstances of the case, parties shall bear their own costs throughout

Revision allowed

1991 ALL L J 788

D S SINHA J

Smt Shakuntala Khare Petitioner v Vth Additional Civil Judge Kanpur Nagar and another Respondents

Civil Misc Writ Petn No 22530 of 1987 D 9 4 1991

U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S 21 — Proceedings under — Tenant seeking production of certain persons for their cross examination after lapse of three years — Belated application filed with view to delay proceedings — Dismissal of Order does not result in serious miscarriage of justice — Can be challenged in appeal — No interference under Art 226

Constitution of India, Art 226 (Para 4)

S M A Kazmi for Petitioner Standing Counsel R C Singh for Respondents

ORDER — Heard Sri S M A Kazmi learned counsel for the petitioner and Sri R C Singh learned counsel for the respondent No 2 at length and in detail

2 It appears that during the proceedings under S 21(1)(a) of U P Act No XIII of 1972 initiated in respect of Premises No 112/279 Swaroop Nagar Kanpur pending before the V Addl Civil Judge Kanpur Nagar two affidavits of Dr P S Mishra and Dr R N Dwivedi were filed on 21st December 1983 and 24th September 1984 respectively at the behest of the landlord In answer to the said affidavits counter affidavits were also filed by the petitioner the opposite party in the aforesaid proceedings and, thereafter, landlord filed rejoinder affidavits

3 After a lapse of a period of more than three years it struck to the tenant opposite party in the proceedings that it was necessary to cross examine the two doctors on their affidavits The tenant therefore filed an application for summoning the aforesaid doctors for the purposes of their cross examination The said application was dismissed by the V Addl Civil Judge Kanpur Nagar respondent No 1 by means of his order dated 18th November 1987 It is this order which is under challenge in this petition under Art 226 of the Constitution of India filed by the tenant petitioner

4 It cannot be disputed that the nature of the order impugned in the writ petition is interlocutory Normally this Court is loath in interfering with an interlocutory order in exercise of its extraordinary writ jurisdiction unless such an order results in grave miscarriage of justice In the instant case the Court is of the opinion that the impugned order does not result in serious miscarriage of justice to the petitioner for two reasons Firstly the petitioner did not approach the authority concerned with the request for production of the aforesaid doctors for the purposes of their cross examination promptly and waited for a period of more than three years There is every possibility that the tenant petitioner waited for a period of three years purposely with a view to delay the proceedings Secondly even if the impugned order is not in conformity with the requirements of law it would be open to the petitioner to attack it in appeal in case it causes any prejudice to her

5 For the fore going reasons the Court is satisfied that this is not a fit case for interference and deserves to be dismissed summarily It is ordered accordingly The interim order/orders, if any shall stand discharged The Court below is directed to conduct the proceedings promptly and in no case later than six months from today

Petition dismissed

1991 ALL L J 789

R A SHARMA J

Committee of Management Shri Ram Deo Sanskrit Mahavidyalaya Bareri and another Petitioners v Vice Chancellor Sampurna Nand Sanskrit Vishwavidyalaya Varanasi and others Respondents

Civil Misc Writ Petn No 20536 of 1990 D/ 12 12 1990

(A) U P State Universities Act (Presidents Act 10 of 1973), Ss 2(13), 49 — Statutes of University, Statute No 12.58 (as amended in 1985) — Dispute as to Management of Mahavidyalaya pending before Vice-Chancellor since 1982 — Forum — Vice chancellor has jurisdiction and not Regional Deputy Director of Education

New Statue 12 28 of the University Statutes is neither retrospective in operation nor does it provide for change over of proceedings to the new forum and as such cannot affect the old existing disputes pending before the Vice Chancellor Thus where the dispute between the two rival committees of the Maha Vidyalaya was pending since 1982 before Vice-Chancellor he would continue to have jurisdiction to decide the controversy in accordance with the unamended Statute 12 28 read with S 2(13) and it could not be said that after the amendment of the Statute it was Regional Deputy Director of Education who was competent to decide the dispute

Case law discussed (Para 8)

(B) U P State Universities Act (President's Act 10 of 1973), S 2(13) — Powers of Vice Chancellor — Dispute as to Management of Mahavdyalaya pending before Vice Chancellor — Controversy decided on basis of compromise — Recording of finding about actual possession and control of College properties — Not necessary

(Para 9)

(C) U P State Universities Act (President's Act 10 of 1973), Ss 2(13), 31, 49 — Dispute as to Management of Mahavidyalaya — Compromise between rival parties — Terms of compromise inconsistent with Act, Statute and bye laws — Order of Vice-Chancellor on basis of compromise — Liable to be set aside

Where a dispute was pending before the Vice Chancellor as to the Management of the Mahavidyalaya and the Vice Chancellor decided the dispute on the basis of compromise arrived at between the two rival parties to the effect that appointment of teachers shall be made with the consent of only the president and the manager and other condition authorising the president and the manager to constitute managing committee and general body such order of Vice Chancellor was not sustainable in as much as according to the Act and the Rules of the University two persons cannot constitute a committee of management or the general body It was also not justified to make life long President and manager of the institution and thus the terms and conditions of compromise being illegal and inconsistent with Act Statute and bye laws could not be sustained (Para 10)

(D) Constitution of India, Art 226 — Alternative remedy — Dispute as to Management of Mahavidyalaya before Vice Chancellor under U P State Universities Act, 1973 — Writ petition against — Parties exchanging counter and rejoinder affidavits and case ready for final hearing — Controversy involved not purely factual controversy — Writ petition not liable to be dismissed on basis of alternative remedy of representation before Chancellor

U P State Universities Act (President's Act 10 of 1973, S 68

(Para 11)

Cases Referred Chronological	Paras
(1990) 16 All LR 520	5
1988 All LJ 355 1988 UPLBEC 104	5
AIR 1967 SC 1419	7
AIR 1966 SC 1499	7
AIR 1957 SC 540	6

G K Singh and R N Singh for Petitioners Standing Counsel for Respondents

ORDER — A registered society known as Shri Ram Deo Sanskrit Mahavidyalaya Bareri Tahsil Mariyahun District Jaunpur

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AI GI A90/91 JJS

runs an institution known as Shri Ram Deo Sanskrit Maha Vidyalaya Bareri, District Jaunpur (here-in after referred to as the Maha Vidyalaya) which is an affiliated institution to Sampurna Nand Sanskrit University Varanasi (here in after referred to as the University) There being dispute between the two rival committees of Management of the Maha Vidyalaya, the Assistant Registrar of the University by his order dated 19-6 1982 recognized the petitioner No 2 as the manager but at the instance of respondent No 6, the Assistant Registrar by the order dated 26-6 1982 recalled his earlier order dated 19 6 1982 and there after referred the dispute to the Vice Chancellor of the University for his decision Against this order of the Assistant Registrar petitioner filed Writ Petition No 10721 of 1982 which was dismissed on 25 1 1983 by this Court on the ground that as the dispute between the parties has been referred to the Vice Chancellor for decision it is not a fit case for interference The Vice Chancellor there after by his letter dated 13 5 1985 constituted a pannel for spot inspection The Vice-Chancellor on the basis of the compromise entered into between Sri Badri Narain Dubey and Sri Sabhapati Upadhyaya passed the impugned order on 2 8 1990 The terms of the compromise as mentioned in the impugned order are as follows (i) Sri Badri Narain Dubey will be life long president and after him his successor will be elected by general body (ii) Sri Sabhapati Upadhyaya will be the manager which is acceptable to Sri Badri Narain Debey (iii) the president and the manager will constitute committee of management and general body (iv) president and manager will appoint principal and the Assistant Teachers (v) Moveable and immoveable properties of the Maha Vidyalaya will be managed by both the president and the manager (vi) in future all appointments shall be made with the consent of the president and the manager, on the basis of the compromise containing the aforesaid terms, the Vice-Chancellor by the impugned order in exercise of powers under S 2(13) of the U P State Universities Act 1973 (here-in after referred to as the Act) [illegible] is approved and dispute of management stands resolved according to which Sri Badri Narain Dubey and Sri Sabhapati Upadhyaya will be president and manager of the Maha Vidhyalaya respectively It is against this order of the Vice Chancellor dated 2 8 1990 that this writ petition has been filed by the petitioners

2 Sri R N Singh learned counsel for the petitioners has challenged the impugned order on the ground (i) that the Vice-Chancellor after the amendment of Statute 12 28 of the First Statutes of the university in 1985 has no jurisdiction to decide the dispute regarding the management of an affiliated college of the University and the person competent to decide such a dispute is the Regional Deputy Director of Education, (ii) Vice Chancellor has not recorded a finding about the actual possession and control of the college properties and (iii) that the order is against the Act Statute and Ordinance framed there under

3 Sri R P Misra learned counsel for the University and Sri Sankatha Rai learned counsel for respondent No 6 have disputed the contentions of the learned counsel for the petitioners and have supported the impugned order In this connection Sri Sankatha Rai has also filed a written argument and Sri R P Misra learned counsel for the University has very fairly placed before me the decisions of this Court relating to the controversy involved in the present case

4 Section 2(13) of the Act Which defines the management is quoted below —

Section 2 (13) Management in relation to an affiliated or associated college, means the managing committee or other body charged with managing the affairs of that college and recognised as such by the University "

According to this definition management means the managing committee which is managing the affairs of the college and recognised as such by the University This provision contemplates the recognition of [illegible] University

But Statute 12 28 of the Statutes of the University as it stands after its amendment in 1985 which is quoted below provides that persons found by the Regional Deputy Director of Education to be in actual possession and control of the properties of the college shall be recognised to constitute the management of the college until decided therewise by competent Court.

12 28 "Where there is a dispute regarding the management of an affiliated college, persons found by the Regional Deputy Director of Education to be in actual possession and control of the college properties may for the purposes of the Act and these Statutes be recognised to constitute the management of such college until a Court of competent jurisdiction orders otherwise

5 A Division Bench of this Court in the case of Brahm Deo Tripathi v Vice-Chancellor 1988 UPLBEC 104 (1988 All LJ 355) has laid down that Statute 12 28 of the Statutes provides a forum for getting the dispute pertaining to management adjudicated by the Deputy Director of Education and the Vice-Chancellor in view of the aforesaid Statute has ceased to have any power to adjudicate on the question as to who is legally constituted a managing committee This Court has accordingly declared that after the amendment of the aforesaid Statutes the Deputy Director of Education has exclusive jurisdiction to decide the controversy on the basis of the actual control Another Division Bench in the case of Committee of Management v U P Kul Sachiv (Writ Petn No 5977 of 1990) decided on 7 3-1990* after noting the apparent conflict between S 2(13) of the Act and Statute 12 28 of the Statutes has held that when there is a bona fide dispute between the two rival committees before the Vice-Chancellor he will stay his hands before granting recognition and will allow the Regional Deputy Director of Education to decide the dispute and it is only after he has received the decision of the Deputy Director of Education that the Vice-Chancellor can grant recognition under S 2(13) of the Act It was further observed that if there is no real or bona fide dispute between the two rival committees then Vice Chancellor will himself straight away exercise the powers of recognising the committee of management There is no conflict between the aforesaid two decisions of this Court in asmuch as in both these between two rival committees of management (sic) It will be resolved by the Deputy Director of Education

6 New Law unless it has retrospective operation, cannot affect pending action In this connection reference may be made to the case of Garikapati v Subbiah Chaudhry AIR 1957 SC 540 where the Hon'ble Supreme Court has laid down that (at p 553 of AIR)

The golden rule of construction is that in the absence of anything in the enactment to show that it is to have retrospective operation it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed.

7 That apart new law, which changes the forum, does not affect pending action unless it also provides for the transfer of proceedings In Manujendra v Purnedu AIR 1967 SC 1419 after the enactment of Calcutta Thika Tenancy Act 1949 The proceedings were pending before Thika Controller under S 29 of that Act During the pendency of these proceedings S 29 was deleted and there after it was argued that Thika Controller as result of deletion of S 29 has lost the jurisdiction over the suit The Supreme Court rejected this contention by holding as follows (at p 1422 of AIR) —

In our view this contention has no force Though S 29 was deleted by the Amendment Act of 1953 the deletion would not affect pending proceedings and would not deprive the Controller of his jurisdiction to try such proceedings pending before him on the date when Amdnement Act came into force "

In the case of Mohd Idris v Sat Narain, AIR 1966 SC 1499 Supreme Court held that proceedings under S 12 U P Agriculturists Relief Act pending at the time of enforcement of U P Zamindari Abolition and Land Reforms Act are not affected by the repeal of the former Act by the later Act One of the reasons given by the Supreme Court was that there is no provision in the later Act providing for the transfer of pending proceedings to the new forum Relevant passage from this judgment is quoted below (at p 1301 of AIR) —

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*Reported in (1990) 16 All LR 520

> The jurisdiction of the Assistant Collector was itself created from July 8 1952 and there is no provision in the Abolition Act that pending cases were to stand transferred to the Assistant Collector for disposal Such provisions are commonly found in a statute Which takes away the jurisdiction of one Court and confers it on another

8 New Statue 12 28 of the Statutes is neither retrospective in operation nor does it provide for change over of proceedings to the new forum and as such cannot affect the old existing disputes pending before the Vice Chancellor In the instant case the dispute is pending since 1982 before the Vice-Chancellor for the reasons given above he will continue to have jurisdiction to decide the controversy in accordance with the unamended Statute 12 28 read with S 2(13) of the Act The first plea of the learned counsel for the petitioner is liable to be rejected.

9 Second plea of the learned counsel for the petitioner pertaining to non-recording of finding by the Vice Chancellor about the actual possession and control of the college properties in accordance with the unamended Statute cannot also be accepted It may be mentioned that the Vice Chancellor has decided the controversy on the basis of the compromise The compromise being based on the consent of the contesting parties can validly be relied upon by the Vice-Chancellor to pass appropriate orders in accordance therewith The moment the contesting parties compromise the dispute dispute ceases to exist and what the Vice-Chancellor can do in such cases is merely to record the compromise and pass the appropriate order accordingly In such a contingency it is not necessary for the Vice-Chancellor to record any finding about the actual possession and control of the college properties

10 The third submission of the learned counsel for the petitioner however has substance and is liable to be accepted S 31 of the Act deals with appointment of teachers of the University and the affiliated colleges This section provides that appointment of teachers of the affiliated colleges shall be made by the management of the college on the recommendation of a selection committee, which shall consist of number of persons including Expert In exercise of powers under S 49 of the Act Statute of the University has been framed and part II of the Statute deals with the appointment of the teachers in affiliated colleges This Statute also provides for appointment by the management on the basis of recommendation of the selection committee Management has been defined as mentioned above by S 2(13) of the Act Which means the management committee or the body charged with managing the affairs of the college and recognised by the University Appointment of the teachers in the Maha Vidyalaya can only be made by the management which means the committee of management and the provision made in the impugned order to the effect that, such, appointment shall be made with the consent of only the president and the manager runs counter to the aforesaid statutory provision and cannot be sustained Similarly other condition authorising the president and the manager to constitute managing committee and general body is also not sustainable in asmuch as according to the Act and the Rules of the society two persons cannot constitute a committee of management or the general body It is also not justified to make life long president and manager of the institution The terms and conditions of the compromise, which have been made part of the impugned order being illegal and inconsistent with the Act Statute and the bye laws of the society cannot be sustained It appears the Vice-Chancellor has passed the impugned order mechanically on the basis of the compromise without ascertaining the legality of the terms and conditions of the compromise The order of the Vice-Chancellor is as such liable to be set aside

11 Learned counsel for the respondent has also raised an objection to the effect that against the order of the Vice Chancellor petitioner has a remedy before the chancellor and the writ petition is liable to be dismissed on this ground alone It is true that a representation before the Chancellor is an alternative remedy which may normally be pursued but in the instant case parties have exchanged counter and rejoinder affidavits and the case is ready for final hearing, although at the admission stage, and the controversy involved is not purely a factual controversy In view of the facts and circumstances of the case, I do not consider it a fit case to dismiss the writ petition on the ground of alternative remedy

12 The writ petition is accordingly allowed and the impugned order of the Vice-Chancellor of the University dated 2 8 1990 is quashed Respondent No 1 is further directed to decide the dispute afresh in accordance with law as clearly as possible In view of the facts and circumstances of the case there shall be no order as to costs

Petition allowed

1991 ALL. L J 793

R B MEHROTRA J

Committee of Management, Nehru Vidyapeeth, Reotipur Ghazipur, Petitioner v District Inspector of Schools, Ghazipur and others, Respondents

Civil Misc Writ Petn No 20744 of 1990 D/ 12 10 1990

(A) **Constitution of India, Art 226 — Mala fides — Order of District Inspector of Schools directing management of school to be handed over to a particular committee of management — Order challenged on ground of mala fides — No notice served in person on District Inspector of Schools — Question of mala fides cannot be considered**

(Para 17)

(B) **U P Intermediate Education Act (2 of 1921), S 16A(7) — Scheme of administration — Order by District Inspector of Schools directing particular committee of management be handed over charge of management and permitting to hold election — Order is without jurisdiction — More so, when it was passed without affording opportunity to person entitled to continue as manager of institution and to hold elections**

Constitution of India, Art 226

Where the District Inspector of Schools passed an order directing a particular Committee of Management of the Institution be handed over the charge of the management and permitting to hold the election the order was without jurisdiction as the District Inspector of Schools had no such authority It was more so when it was passed without affording an opportunity to the person who was entitled to continue as Manager of institution and to hold elections In such a case the order cannot be justified on the ground that the said order was an administrative order and High Court should not interfere An order which is wholly without jurisdiction cannot be allowed to be sustained merely on the ground that it is an administrative order Even otherwise an administrative order which is arbitrary can be challenged under Art 226 of the Constitution of India if it affects the right of a party Further in such a case it could not be said that the District Inspector of Schools passed the said order in pursuance of an order of the Deputy Director of Education as an interim arrangement since the dispute was pending before the Deputy Director of Education There is no power with the Deputy Director of Education to pass any interim order in a dispute pending before it for deciding the controversy under S 16A(7) of the U P Intermediate Education Act and moreover there was no order on the record whereby the Deputy Director of Education directed the District Inspector of Schools to pass the impugned order which the District Inspector of Schools claimed to have passed in pursuance of the order passed by the Deputy Director of Education

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1985 All LJ 27 Ref
1990 All LJ 509 Disting

(Paras 18, 20)

Cases Referred Chronological Paras

1990 All LJ 509 1990 All WC 778 (Disting) 19
1985 All LJ 27 1984 UPLBEC 670 (Ref) 19

Sankatha Rai, for Petitioner Standing Counsel, for Respondents

ORDER — By means of the present writ petition under Art 226 of the Constitution of India, the petitioner has challenged mainly the order passed by the District Inspector of Schools, dated 4 8-1990 whereby the District Inspector of Schools has directed that the Management of the institution may be handed over to the committee of Management of which Sri Sheo Shanker Singh Yadav is the manager for the purposes of managing the institution for purposes of dealing with the Department

2 When the writ petition was placed before me at the admission stage, the contesting respondents were present as caveator and the matter has been finally heard at the admission stage with the consent of the parties

3 Sri Sankatha Rai appearing for the petitioner vehemently contented that the impugned order passed by the District Inspector of Schools is without jurisdiction and has been passed without affording any opportunity to the petitioner who is continued to manage the institution, as such the order is liable to be set aside The counsel for the respondents Sri A N Singh on the other hand contended that the District Inspector of Schools has passed the order for efficient administration and running the institution as the institution was lying closed, the interest of the institution and the education required passing of the impugned order as such this Court should not interfere with the order in exercise of extra ordinary jurisdiction under Art 226 of the Constitution of India. It was also contended on behalf of the respondents that there is a specific finding of the Civil Court holding that the petitioner is not even an ordinary member of the society and as such is not competent to become the manager besides that several other authorities have also held that the petitioner is not the ordinary member of the society as such at the instance of such a petition this Court should not interfere with the order passed by the District Inspector of Schools which has been passed for safeguarding the interest of the institution and education

4 In large number of institutions in the State a chronic disease has crept in where two rival committees of management are fighting each other for getting the control of the management committee The fact remains that every pie of the expense of these recognised intermediate Education Institutions is borne either by the State Government or the same is managed by the fee received by the students The Management has hardly any contribution in the financial aspect of the matter This chronic litigation between the two rival committees of management mostly results in hampering the efficient working of the institution and mostly the cause of the students, education and teachers suffer due to this fight amongst two rival committees of management which hardly contribute anything towards the advancement of the education or any financial assistance to these institutions The situation requires some consideration at the level of the State Government as to how this chronic problem prevailing in the State of Uttar Pradesh should be solved More unfortunate part is that due to this chronic litigation in large number of institutions, this Court is burdened with large number of writ petitions passed by the educational authorities deciding the disputes between the two committees of management as against these orders, no regular appeal is provided and the order passed by the Deputy Director of Education for deciding the effective control of the management in exercise of his power under S 16A(7) of the U P Intermediate Education Act, 1921 is final for the purposes of the Act and all such orders connected with the disputes of the educational institutions are

being challenged directly in this Court under Art 226/227 of the Constitution of India. It is suggested that the State Government should consider some legislative measure for providing the establishment of an independent tribunal so that the disputes in respect of the educational institutions can be effectively solved

5 The present case itself is an illustration to demonstrate that the vice of litigation in educational institution has eaten the vitals of the institution itself the only contribution of the Management today in most of the institutions is that the institutions and the teachers are being used by rival factions of the management for serving their personal ends and the biggest sufferer in the situation is the student belonging to ordinary class of citizens who cannot afford to teach their wards in English Convents

6 A dispute in respect of the present institution arose as far back as in the year 1972 and an Authorised Controller was appointed under S 16D(4) of the U P Intermediate Education Act, 1921 (hereinafter referred to as the Act (The said order of appointing the Authorised Controller was revoked as far back as on 8 7 1974 and Sri Sheo Shanker Singh Yadav the respondent, was handed over the charge of the office of the manager of the institution Immediately on handing over the charge, a protest was made, that Sri Sheo Shanker Singh Yadav has been illegally handed over the charge of the institutions as Manager, on 2 9 1979, the Regional Deputy Director of Education, V Region, again appointed an Authorised Controller, under S 6(3) of the U P High School and Intermediate Colleges (Payment of Salaries to teacher and other employees) Act, 1971 (hereinafter payment of Salaries Act) An appeal against the said order was filed under S 7 of the said Act which appeal has not been decided In the meantime, Sri Sheo Shanker Singh Yadav also filed a writ petition in the High Court but the said writ petition has abated on the ground that an alternative remedy to file an appeal before the Director of Education is available On 26 2 1978, the Regional Deputy Director V Region Varanasi passed an order in favour of Sri Sheo Shanker Singh Yadav behind the back of Sri Raja Ram Pandey who was claiming himself to be the duly elected manager of the institution. Lateron the said order appointing the Authorised Controller was revoked and it was directed that charge should be given to Sri Sheo Shanker Singh Yadav Respondent No 4 Sri Raja Ram Pandey filed a writ petition in this Court to challenge the order of the Deputy Director of Education V Region dated 26 2 1978 and the order of the State Government dated 8 7 1974 The said writ petition was dismissed on the ground that the Committee of Management has an alternative remedy to file a regular suit Consequent thereto the then Committee of Management filed a regular Civil Suit The trial Court vide its judgment dated 12 9 1984 decreed the suit and directed Sri Sheo Shanker Singh Yadav to handover the management of the institution to the plaintiff, namely the Committee of Management of which Sri Raja Ram Pandey claimed himself to be the manager Aggrieved by the aforesaid judgment of the learned Munsif Ghazipur dated 12 9 1984 Sri Sheo Shanker Singh Yadav filed an appeal The II Addl District Judge Ghazipur, vide his judgment, dated 4-1 1988 allowed the appeal and held that defendant No 1, namely, Sri Sheo Shanker Singh Yadav as Manager shall hold the education of the Managing Committee and the society within three months strictly and if needed under the supervision of a supervisor appointed by the Court It was further directed that the election shall be held according to the scheme of Administration and bye-laws of the institution duly registered and approved by the Director after serving notice according to the rules to all members of the general body

7 Aggrieved by the aforesaid judgment, a second appeal was filed in this Court which has been numbered as Second Appeal No 800 of 1988— Nehru Vidyapeeth Reotipur, through Sri Shri Niwas Rai and another v Sri Shiv Shanker Singh Yadav The petitioner s

contention is that the impugned judgment passed by the II Addl District Judge Ghazipur allowing the appeal of respondent No 4 has been stayed by this Court in the aforesaid second appeal The counsel for the respondents has contested the said statement and has submitted that the stay order granted by this Court in the aforesaid second appeal was a limited stay order and has exhausted Both the parties filed affidavits along with true copies of the documents by which they made rival claims for contending that the interim order passed by this Court in Second Appeal No 800 of 1988 has exhausted itself and other version being that the stay order is continuing However, for ascertaining the correct facts I asked both the parties to produce the certified copies of the documents which they have filed with the affidavits to ascertain as to which version is correct Sri Sankatha Rai has placed before me Certified copy of an order of this Court dated 22-4-1988 passed in the aforesaid second appeal by Hon'ble N N Mithal J in the following terms —

"Put up on 25th April 1988 The stay order is extended "

The earlier orders passed in the case are not in dispute whereby the operation of the judgment of the II Addl District Judge, Ghazipur, dated 4th January 1988 was stayed

8. The counsel for the respondents has produced a query receipt from the Registry of the High Court which is as under —

"(1) Whether the stay order granted on 31 3-88 was extended beyond 25-4-88 —No—

(2) Whether the stay order dt. 31 3-88 has already lapsed —Yes—"

9 On the basis of the aforesaid query the contention of the learned counsel for the respondents is that the stay order granted by this Court has exhausted on 25-4-1988 The relevant portion of the first order passed by this Court in the aforesaid second appeal is

Meanwhile till 25 4 1988 subject to any order passed earlier the direction contained in the judgment of the learned II Addl. District Judge Ghazipur, dated January 4 1988 which is under challenge in the present appeal about holding of fresh elections shall remain inoperative

10 The order dated 22 4-1988 extending the stay order cannot mean that the stay order was to exhaust on 25th July 1988 The two orders read together make it clear that this Court extended the stay order by its order dated 22 4 1988 indefinitely If the Court wanted to extend the order only till 25 4 1988 there was no sense in writing that the stay order is extended as the Court itself directed the matter to be posted on 25 4 1988 till which date there was already an order of the Court staying the operation of the judgment I do not agree with the contention of the counsel for the respondent that the stay order passed by this Court staying the operation of the judgment of the II Addl. District Judge dated 24 1 1988 has exhausted

11 To resolve the controversy between the parties that certified copy of the order dated 22 4-1988 is genuine or not or the query received by the counsel for the respondents is incorrect I summoned the original record of the second appeal and found that the ordersheet, dated 22 4 1988 is missing from the record of the second appeal It is a shocking state of affair which shows that either the Registry of this Court is capable of being manipulated to the extent that a page of the ordersheet of the High Court's record is taken out from the record or the Registry of the High Court can give a false certified copy to a party eventhough there may not be any order This matter requires serious consideration of the Registrar of the Court and I order that the Registrar will hold an enquiry in the matter and make suitable action against the concerned faulting officers or officials The two certified copies referred to in this judgment along with the record of the second appeal may be forwarded to the Registrar of this Court for taking suitable

action along with the copy of the judgment of this case

12 The Committee of Management of which Sri Raja Ram Pandey was claiming himself to be the Manager of the institution alleges to have held fresh election on 22 10 1986 During the pendency of the First Appeal before the 2nd Addl District Judge an Authorised Controller was appointed on 25 9 1983 under Section 6(3) of the Payment of Salaries Act On 27 10 1986 the then District Inspector of Schools intimated to the Deputy Director of Education that a valid election has been held of the Committee of Management of which earlier Sri Raja Ram Pandey was manager and as such the order of appointment of the Authorised Controller may be withdrawn The Deputy Director of Education in its turn referred the matter to the Director of Education The Director of Education thereafter requested the State Government vide his letter dated 10 7 1986 to remove the Authorised Controller The State Government vide its order dated 23 12 1986 removed the Authorised Controller The District Inspector of Schools in pursuance of the aforesaid order of the State Government handed over the charge to the petitioner being the duly elected Manager of the Committee of Management vide its order, dated 3 1 1987 Aggrieved by the aforesaid order the present respondent Sri Shiv Shanker Singh Yadav filed a Writ Petition in this Court being Civil Misc Writ No 351 of 1987 The said writ petition is still pending In the said writ petition, a Division Bench of this Court on 8 1 1987 directed maintaining of status quo The petitioner claimed that no further orders were passed in the said writ petition and the petitioner s signatures were already attested and the petitioner was already working and the order passed by this Court in effect permitted the petitioner to continue as manager of the institution However, Sri Raja Ram Pandey who was earlier Manager of the institution filed another writ petition which was numbered as Writ Petition No 823 of 1987 which also challenged the order of the Deputy Director of Education dated 3 1-1987 handing over the charge of the institution to the petitioner In the said writ petition a Division Bench of this Court passed another order dated 9 1 1988 whereby the District Inspector of Schools was directed to continue to manage the institution until further orders and the Court also directed the District Judge Ghazipur to dispose of the Appeal No 199 of 1984 within a period of three months from the date of the order The stay vacating application in the said writ petition came up for hearing before the learned single Judge of this Court on 2 9 1987 who confirmed the interim order passed by this Court on 9 1 1987 and called for a report from the District Judge Ghazipur as to whether Appeal No 199 of 1984 has since been decided by him as per directions of this Court contained in the order dated 9 1 1984 However thereafter Sri Raja Ram Pandey died and an application was filed in Writ Petition No 823 of 1987 that left out petitioner is not interested in pursing the writ petition The writ petition was accordingly dismissed by order dated 30 1 1989 The petitioner immediately thereafter filed an application before the District Inspector of Schools for permitting the petitioner to work as Manager as the interim order passed by this Court on 9-1 1987 stood automatically vacated by the dismissal of the said writ petition Despite the said representation the District Inspector of Schools did not pay any heed and on the other hand intimated to the Manager Union Bank of India that he will continue to operate the accounts as the Authorised Controller of the institution by his order dated 5 4-1989 The said order dated 5 4 1989 passed by the District Inspector of Schools was challenged in writ petition No 10477 of 1989 In the said writ petition, this Hon ble Court was pleased to pass an order on 14-6-1989 staying the operation of the order, dated 5 4 1989 Consequent to the said order passed by this Court, the petitioner claimed that the charge was again handed over to the petitioner on 25 4-1989 and signatures of the petitioner were again attested However subsequent thereto, by an order dated 31 12-1989 the Deputy Director of Education appointed the District Inspector of Schools Ghazipur as Pradhan

Sanchalak on the ground that 3 years term of the Committee of Management of which Sri Shri Niwas Rai (Present Petitioner) as Manager as expired as the Committee was elected in October 1984 It was further directed that the Prabandha Sanchalak shall start the process of the election of the new Committee of Management according to the amended scheme of Administration after discharge of the stay order passed in the second appeal pending before this Court The petitioner filed another writ petition challenging the order of the Deputy Director of Education dated 31 12 1989 appointing the District Inspector of Schools as Prabandha Sanchalak and directing him to hold the election This Court vide its order dated 19 1 1990 allowed the writ petition of the petitioner and sent back the matter to the Deputy Director of Education to pass fresh orders after affording an opportunity of hearing to both the parties. The said matter is still pending before the Deputy Director of Education and the same has not been heard The parties have already filed their replies before the Deputy Director of Education It is admitted between the parties that the matter has not yet been decided by the Deputy Director Education in pursuance of the direction given by this Court However, during the pendency of the aforesaid matter the District Inspector of Schools has passed the impugned order which is in challenge in the present writ petition

13 The counsel for the petitioner has challenged the said order mainly on four grounds

Firstly that the order of the District Inspector of Schools directing the Committee of Management elected by respondent No 4 be handed over the charge of the Management and permitting to hold the election is without jurisdiction The District Inspector of Schools has no such authority

14 Secondly, that the said order has been passed without affording an opportunity to the petitioner who was entitled to continue as Manager of the institution and was also entitled to hold elections

15 The third submission of the learned counsel for the petitioner is that in the counter affidavit it has been disclosed that the District Inspector of Schools has passed the said order in pursuance of an order of the Deputy Director of Education as an interim arrangement since the dispute is pending before the Deputy Director of Education The submission of the counsel for the petitioner is that there is no power with the Deputy Director of Education to pass any interim order in dispute pending before it for deciding the controversy under S 16A(7) of the U P Intermediate Education Act and moreover, there is no order on the record whereby the Deputy Director of Education directed the District Inspector of Schools to pass the impugned order which the District Inspector of Schools claimed to have passed in pursuance of the order passed by the Deputy Director of Education

16 Lastly it has been contended that the Deputy Director of Education has acted mala fide in passing the aforesaid order which is clear from the fact that even before the order was communicated to all concerned i e on 4 8 1990, the District Inspector of Schools just attested the signature of respondent No 4 as Manager of the institution one day earlier on 3-8 1990 This fact itself shows that action of the District Inspector of Schools, who has also been arrayed as respondent No 2 in person is mala fide

17 So far as the question of *mala fide* is concerned, no notice has been served in person on the District Inspector of Schools and in his absence, I decline to consider the question of mala fide and I do not think it necessary, in the facts of the present case, to issue notice to Sri Jaipal Singh, who has been arrayed in person as respondent No 2 The District Inspector of Schools and the Deputy Director of Education are represented through standing counsel

18 I have heard the learned counsel for the parties at some length and I am satisfied that the order passed by the District Inspector of Schools, dated 4 8 1990 impugned in the

present writ petition is patently without jurisdiction and has been passed without affording an opportunity to the petitioner The counsel for the respondent has been unable to cite any provision of law under which the District Inspector of Schools was authorised to pass the impugned order He has mainly contended that as the said order is an administrative order. Court should not interfere. I do not agree with this submission of the learned counsel for the respondent An order which is wholly without jurisdiction cannot be allowed to be sustained merely on the ground that it is an administrative order Even otherwise, an administrative order which is arbitrary can be challenged under Art 226 of the Constitution of India if it affects the right of a party In the present matter, the facts clearly demonstrate that the petitioner s rights were severely prejudiced and such an order could not have been passed administratively by a person who has jurisdiction to pass such an order (sic) the said order also could not have been passed without affording an opportunity to the petitioner I also agree with the submission of the petitioner s counsel that there is no power with the Deputy Director of Education to pass an interim order in a matter pending before it under S 16A(7) of the Act Moreover, neither the standing counsel nor the respondent has been able to place any interim order passed by the Deputy Director of Education authorising the District Inspector of Schools to pass the impugned order

19 The learned counsel for the petitioner in support of his contention relied on a decision of this Court in the case of Committee of Management of Sri Panna Lal Digambar Jain Inter College Firozabad, Agra v District Inspector of Schools, Agra reported in 1984 UPLB EC 670 (1985 All LJ 27) wherein this Court has laid down (at p 28 of All LJ)

Under S 16A(7) of the Intermediate Education Act, the Deputy Director of Education has to determine as to which of the rival management committees is in actual control and it is but proper that the District Inspector of Schools should not act in a manner which may improve prospect of other rival group to the detriment of other

In reply to the aforesaid contention, the counsel for the respondent has relied upon the case reported in 1990 All WC 778 (1990 All LJ 509), Committee of Management Sri Pyare Lal Shastri Junior High School v Basic Shiksha Adhikari which says that no interference is called for in an administrative order even if the same has been passed without affording an opportunity of hearing It was a case on peculiar facts, so it is patently distinguishable

20. After considering the aforesaid decisions, I am definitely of the view that the order passed by the District Inspector of Schools is wholly without jurisdiction and could not have been passed without affording an opportunity to the petitioner

21 The writ petition is accordingly allowed and the impugned order, dated 4-8 1990 and subsequent orders passed on 9 8 1990 (Annexure 4 and 25' to this writ petition) are quashed. The Deputy Director of Education is, however directed to decide expeditiously the dispute pending before him in the present matter, within a period of three months from the date of the certified copy of this order is produced before him by any of the party

Petition allowed

1991 ALL. L. J 799

S K. DHAON AND D S SHINA, JJ

Sartaj Ali Khan, Petitioner v Additional District Magistrate (Admn), Aligarh and others, Respondents

Civil Misc Writ Petn No 10972 of 1991, D/ 21-5-1991

U P Municipalities Act (2 of 1916), S 87A – No confidence motion against President of Municipal Board – Notice sent by Additional District Magistrate under orders of District Magistrate – Not invalid on ground

that it was not sent by District Magistrate himself

Municipalities — No confidence motion against President of Municipal Board — Notice

Words and Phrases — Word "Send" — Means "to cause to issue"

Administrative Law — Administrative Acts — Ministerial parts can be carried out by subordinates

Where in respect of the no confidence motion against the President of Municipal Board, the notice was sent by the Additional District Magistrate under the orders of the District Magistrate the notice would not be invalid on the ground that it was not sent by the District Magistrate himself as required by S 87A of the U P Municipalities Act It cannot be said that even if the District Magistrate had authorised the Additional District Magistrate to send notices to the members but having not himself signed the same there will be non compliance of the provisions of sub sec (3) of S 87A The dictionary meaning of the word send is to cause or direct to go despatch as a messenger to cause to be conveyed to another place transmit forward to send a letter The word send has been used not in a technical sense but in the sense as defined in the dictionary one such sense being to cause to issue"

1961 All LJ 226 Foll (Paras 4 7, 8)

Under S 87A of the Act the duty laid on the District Magistrate is to cause such notice to be published in the manner he shall deem fit. This condition will be satisfied if the notice is caused to be sent by him in the manner deemed fit by him The absence of his signature on the notice has no effect on its validity if it otherwise satisfies the conditions regarding the date, time etc Moreover, the duty of sending a notice provided in sub-sec. (3) is an administrative act to be done by him In exercising such acts it is usual that subordinates are deputed to carry out the ministerial part which cannot possibly be done by the superior authority himself The ministerial part which has not been done by the authority itself but has been done by a subordinate in pursuance of the order and direction of the superior authority is to all intents and purposes the act of the superior authority itself which in performing that part acts through its subordinates AIR 1958 All 374 (FB) and 1975 All LJ 450 (FB) Disting (Para 8)

Cases Referred Chronological Paras

1975 All LJ 450 AIR 1975 All 315 (FB) (Disting) 9
1961 All LJ 226 (Foll) 8
AIR 1958 All 374 (FB) (Disting) 9

R H Zaidi, for Petitioner Standing Counsel for Respondents

ORDER — The petitioner, the President of the Municipal Board, Sikendra Rao, on 24th April, 1991 presented this petition with the prayers that the notices dated 4th April 1991 and 12th April 1991 sent by the Additional District Magistrate to the effect that the motion of non confidence as against the petitioner shall be considered by the members of the Board on 25th April, 1991, may be quashed

2 This Court on 24th April, 1991 passed an interim order to the following effect

If the motion of no confidence against the petitioner is carried out in the meeting to be held on 25th April, 1991 it shall not be given effect to till 12th May, 1991 provided the order is not modified before that date "

3 The motion of non confidence as against the petitioner was put to vote on 25th April, 1991 and it was declared that the same had been carried An application seeking the amendment of the writ petition has been filed and the prayer is that the proceedings held on 25th April, 1991 may be quashed

4 The petitioner had raised the factual controversy that the notice of the meeting had not been issued by the District Magistrate and the Additional District Magistrate who was not empowered to act under S 87A of the U P Municipalities Act (hereinafter

referred to as the Act) performed the job which under the statute the District Magistrate alone could perform. In the ends of justice, this Court directed the Chief Standing Counsel to produce the relevant record. That has been done. We have perused the same. From a perusal of the record, we are satisfied that the steps taken were these. On 11th March, 1991 a motion of non confidence was presented before the District Magistrate by more than two members. It was purported to have been signed by 14 members. On 30th March, 1991 the District Magistrate sent a communication to the District Judge, Aligarh stating therein that 14 members of the Board had presented a motion of non confidence against the petitioner on 11th March, 1991, in accordance with S. 87A(1) Civil Judicial Officer had to preside over the meeting wherein the motion of non confidence was to be considered and therefore he (the District Judge) was requested to nominate some Civil Judicial Officer who may preside over the meeting which may be held on any date between 10th April and 14th April, 1991 at 11 a.m. at the office of the Board. On 2nd April, 1991 Sri Satish Kumar, First Additional Civil Judge, Aligarh sent a communication to the District Magistrate stating therein that with reference to the communication dated 30th March, 1991 of the District Magistrate, the District Judge had nominated him as the Presiding Officer. The Additional Civil Judge drew the attention of the District Magistrate to the provisions as contained in S. 87A of the Act and requested him (the District Magistrate) to take necessary steps in accordance with law. On the receipt of the said communication, the District Magistrate, on that very communication, fixed 13th April, 1991 as the date of the meeting for consideration of the motion of non confidence. He also directed that the notice may be issued. He also directed that necessary information may be sent to the First Additional Civil Judge. On 5th April, 1991 the District Magistrate sent a communication to the First Additional Civil Judge informing him that with reference to his (Additional Civil Judge's) letter dated 2nd April, 1991 he had fixed 13th April, 1991 as the date of the meeting to be held at the office of the Board at 11.00 a.m. Notices were sent to the individual members including the petitioner under the signatures of the Additional District Magistrate. Public notice of the meeting was also effected under the signatures of the Additional District Magistrate. On 12th April, 1991 the Additional Civil Judge informed the District Magistrate that he would not be in a position to preside over the meeting on 13th April, 1991 and instead he had fixed 25th April, 1991 as the next date of the meeting to be held at 11.00 a.m. He, therefore, requested the District Magistrate to get necessary notices etc. issued. Copy of this communication was sent by the Additional Civil Judge to the petitioner also. On 12th April, 1991 the Additional District Magistrate put up a note before the District Magistrate inviting his attention to the communication of the Additional Civil Judge by which he had postponed the meeting from 13th April to 25th April, 1991 and had fixed 11.00 a.m. as the time at which the meeting would be held. He also requested the District Magistrate that if he considered proper, necessary orders to be passed that the meeting of 13th April has been postponed and 25th April has been fixed as the next date of the meeting. It may also be indicated that the meeting will take place at 11.00 a.m. on that day. The District Magistrate on 13th April appended his signature on the said note of the Additional District Magistrate. On 13th April, 1991 the Additional District Magistrate issued a notice, inter alia, stating therein that the meeting which was scheduled to be held on 13th April, 1991 at 11.00 a.m. will now be held on 25th April, 1991 at 11.00 a.m. Copy of this communication was sent by the Additional District Magistrate to the District Information Officer with the request that wide publicity be given to the said notice in the local newspaper. Copy of the said communication was also sent to the petitioner and also to the Executive Officer of the Board

It may be stated here that the notice dated 13th April 1991 made it clear that the Additional District Magistrate was acting under the orders of the District Magistrate

5 Shri R H Zaidi has argued this petition on behalf of the petitioner at length He has advanced the following submissions

(1) The District Magistrate had not sent the notice himself

(2) The publication of the notice as enjoined in the second part of sub-sec (3) of S 87A of the Act was not done by the District Magistrate but by the Additional District Magistrate

(3) The notice dated 12/13 April 1991 was again not sent by the District Magistrate but by the Additional District Magistrate and

(4) On 8th April 1991 three existing nominated members had been illegally removed as members of the board and in their place three fresh persons had been nominated as members of the Board The participation of these three fresh persons in the meeting held on 25th April, 1991 vitiated the proceedings

6 The first three submissions are inter connected The answer to these submissions will turn upon the language employed by the Legislature in sub-sec (3) of S 87A of the Act This provision is, therefore being extracted

"(3) The District Magistrate shall then convene a meeting for the consideration of the motion to be held at the office of the board, on the date and at the time appointed by him which shall not be earlier than thirty and not later than thirty-five days from the date on which the notice under sub sec (2) was delivered to him He shall send by registered post not less than seven clear days before the date of the meeting a notice of such meeting and of the date and time appointed therefor, to every member of the Board at this place of residence and shall at the same time cause such notice to be published in such manner as he may deem fit Thereupon every member shall be deemed to have received the notice

7 We have already indicated that the District Magistrate had convened the meeting for the consideration of motion of non confidence He had fixed the date and time of the meeting and he had fixed the venue of the meeting though this act was not to be done as under sub-sec (3) the venue of the meeting is fixed as the office of the Board.

8 The argument of Shri Zaidi is that in sub sec (3) of S 87A the Legislature has drawn a distinction between the act to send a notice and the act of causing a notice to be sent" He has, therefore, vehemently urged that even if the District Magistrate had authorised the Additional District Magistrate to send notices to the members but had not himself signed the same there will be non compliance of the provisions of sub-sec (3) of S 87A We are not impressed with this submission The dictionary meaning of the word send' is to cause or direct to go, despatch, as a messenger to cause to be conveyed to another place, transmit forward to send a letter ' On a careful reading of sub-sec (3) of S 87A we have no hesitation in taking the view that the word "send" has been used not in a technical sense but in the sense as defined in the dictionary, one such sense being to cause to issue (See Webster' Comprehensive Dictionary Encyclopaedic Edition Vol II column 1144) This controversy is not res integre In Krishna Chandra Gupta v Prayag Narain, 1961 All LJ 226 it has been held that neither sub-sec (3) nor sub-sec (5) of S 87A has in providing the notice to be given under its provisions required that the same shall be signed by the District Magistrate personally The duty laid on the District Magistrate is to cause such notice to be published in the manner he shall deem fit This condition will be satisfied if the notice is caused to be sent by him in the manner deemed fit by him The absence of his signatures on the notice has no effect on its

validity if it otherwise satisfies the conditions regarding the date time etc Moreover the duty of sending a notice provided in sub-sec (3) is an administrative act to be done by him In exercising such acts it is usual that subordinates are deputed to carry out the ministerial part which cannot possibly be done by the superior authority himself The ministerial part which has not been done by the authority itself but has been done by a subordinate in pursuance of the order and direction of the superior authority is to all intents and purposes the act of the superior authority itself which in performing that part acts through its subordinates We have already indicated that both the occasions namely when the first meeting was scheduled to be held on 13th April, 1991 and when the second meeting was fixed for 25th April 1991 the Additional District Magistrate acted under the supervision and direction of the District Magistrate while sending the notices This decision, therefore in our opinion is apposite

9 Considerable reliance has been placed by the learned counsel upon the Full Bench decision of this Court in Mahesh Chandra v Tara Chand, AIR 1958 All 374 This judgment has been rendered by three Hon ble Judges It has been emphasised that the first part of sub-sec (3) of S 87A which deals with the acts preceding the passing of the motion of non confidence, is mandatory The same view has been reiterated by another Five-Judge decision of this Court in the case of Sardar Gyan Singh v District Magistrate Bijnor 1975 All LJ 450 (AIR 1975 All 315) (Para 8) We have already taken the view that in the instant case in the eye of law it shall be treated that the District Magistrate himself sent the notices to the members including the petitioner Therefore these decisions really do not advance the case of the petitioner

10 Now we come to the last submission It is an admitted position that on 25th April, 1991 fourteen members of the Board voted in favour of the motion of non confidence In paragraph 1 of the writ petition it is stated that the total membership of the Board was 21 on 25th April 1991 It comprised the President elected members ex officio members and the nominated members It is not in dispute that there were 15 elected, 3 nominated members President as one of the members and there were 2 ex officio members who were either a Member of Parliament or the Legislative Assembly Assuming that the membership of the 3 nominated members had been wrongly cancelled and in their place three persons who could not be nominated, were made members and these members participated in the meeting held on 25th April, 1991 or the erstwhile three nominated members participated and voted against the motion of non confidence the result would have been the same In any view of the matter, at least 11 members of the Board would have voted against the petitioner and in favour of the motion of non confidence and the number of 11 would have been more than half of the total number of members of the Board, namely 21 Therefore, no prejudice has been caused to the petitioner by the exit of the three nominated members and by the incoming of the three fresh nominated members

11 No other submission has been made on behalf of the petitioner

12 The petition is dismissed with costs The interim order dated 24th April 1991 is hereby discharged

13 An oral prayer has been made on behalf of the petitioner for the grant of certificate to prefer an appeal to the Supreme Court of India under Art 134A of the Constitution We feel that the question raised in this petition is neither of any general importance nor does the decision of such a question require consideration by the Supreme Court The certificate prayed for therefore is rejected

Petition dismissed

1991 ALL L J 804

N L GANGULY J

Virendra Singh Petitioner v The District Magistrate Aligarh and others Respondents

C M W P No 13845 of 1988 D/- 9 5 1991

(A) **U P Panchayat Raj Rules (1947), R 20H — Election of office bearers of Gaon Sabha — Symbols once allotted cannot be changed subsequently at the time of election or counting of ballots**

U P Panchayat Raj Act (26 of 1947), S 110

Where the symbols for election of office bearers of Gaon Sabha were allotted in accordance with the provisions of R 20H of the U P Panchayat Raj Rules (1947) framed under the U P Panchayat Raj Act there is no provision in the Act or the Rules to indicate that the symbols once allotted can be changed subsequently at the time of election or at the time of counting of the ballots Therefore where under duress and coercion of the immediate next defeated candidate the returning officer obtained in writing from all the other contestants in the election in writing that symbol of the returned candidate be allotted in the name of the said defeated candidate and such writing was obtained from the other contestants except the returned candidate the order of the returning officer was invalid There is no provision in the Act or the Rules which may direct the returning officer to get such writing at the time of counting and after such writing to declare the result on its basis (Para 1)

(B) **U P Panchayat Raj Act (26 of 1947), S 12-C — Election of office bearers of Gaon Sabha — Symbols originally allotted changed by returning officer at the time of counting under coercion by next defeated candidate — Writ petition by returned candidate — Not barred by virtue of existence of alternative remedy of election petition**

Constitution of India, Art 226

Where in the matter of election of office bearers of Gaon Sabha the symbols originally allotted were changed by the returning officer at the time of counting of votes under the coercion on behalf of the next defeated candidate, the writ petition filed by the returned candidate would not be barred on the ground of existence of alternative remedy of an election petition under S 12C of the U P Panchayat Raj Act It would not be fair for the High Court after a lapse of more than 2½ years to drive away the petitioner to subordinate Court seeking relief of general procedure of election petition If such a course is adopted the persons who took law in their own hands and obtained a declaration in his own favour by creating such a situation that the returning officer was compelled to declare the result it would lead to injustice, rather to justice And if it is found necessary for promotion of justice and prevention of injustice which is the primary object of the constitutional provision the bar of alternative remedy would not operate for entertaining the writ petition

AIR 1988 All 151 and 1990 Lab IC 1173 (All) Foll (Para 2)

Cases Referred	**Chronological**	**Paras**
1990 Lab IC 1173	1990 UPLBEC 279 (Foll)	2
AIR 1988 All 151	1988 UPLBEC 218 (Foll)	2
1981 UPLBEC 61	1981 All CJ 1 (FB)	2
AIR 1969 SC 556		2
AIR 1958 SC 86		2

S S Chawan for Petitioner Standing Counsel for Respondents

ORDER — Election of office bearers of the goan sabha was held on 7 6 1988 The petitioner respondent No 5 and three other persons had filed their nomination papers before the authority concerned 24 5 1988 was the last date for withdrawl of the nomination papers and 5 6-1988 was the date of election On 25 4 1988 symbols were allotted to the various candidates who had filed their nomination papers. Om Prakash, Jeetendra Kumar, Dalberi Devi, Malkhan Singh and Virendra Singh were allotted symbols kursi (chair), kalam dawat (ink pot with pen), tractor and ghora (horse) respectively. These symbols were allotted in accordance with the provisions of R. 20A (20H) of the Rules framed under the U.P. Panchayat Raj Act, hereinafter referred to as the Act. The polling was done on 5-6-1988. After counting the votes on 7-5-1988, the Returning Officer was about to declare the result of the election and declare the name of the elected pradhan. There were disturbances and commotion on account of the rival contestants in the election. Admittedly, at the time of allotment of the symbols, the petitioner Virendra Kumar was allotted the symbol of horse and respondent No. 5 was allotted the symbol of tractor. After counting it was found that the candidate with symbol horse had received 231 votes and the other candidates next to him had received 184 votes having symbol of tractor. It is stated that the petitioner since had obtained the maximum number of votes, was entitled to be declared as elected pradhan. But as soon as the counting was over, the respondent No. 5 who is a member of Kisan Union along with Harpal Singh, President of the said Union and other members of the said Union, and a large number of persons along with his brother who is an advocate came to the returning officer and threatened him with dire consequences. The aforesaid persons had threatened the Block Development Officer concerned that they shall create problems as was created in Hathras and they asked the returning officer to declare respondent No. 5 as elected pradhan, having symbol of horse allotted to him. The returning officer intimated the Zonal Magistrate of the area who were present at the office of the returning officer with his record. After receiving the message of the returning officer, the election officer/District Magistrate by wireless directed the returning officer to decide the case according to his conscience. The allegations of the petitioner is that the respondents had created a terror and the returning officer was under a strain and fear of the respondents. In such a situation under duress and coercion of the respondents, the returning officer obtained in writing from all the other contestants in the election in writing that Symbol horse be allotted in the name of the respondent No. 5. Such writing was obtained from the other contestants except the petitioner. After obtaining such writing from the contestants, the returning officer declared the result of the counting and declared respondent No. 5 as elected pradhan. After being aggrieved by the high handedness and arbitrary act of the respondent, and the illegal declaration of the election result by the returning officer, the petitioner filed the present writ petition. It is worth noting that this petition was filed on 28-7-1988. Notices were directed to be served to the respondents. Respondent No. 5 put in appearance through Sri Rajesh Pathik on 6-9-1988. He was directed to file a counter affidavit and was granted 3 weeks time. No counter affidavit was filed on behalf of respondent No. 5. The case was again listed but no counter affidavit was filed. Ultimately, the case was listed on 5-10-1988. Further two weeks time was granted to respondent No. 5 for filing counter affidavit. No couner affidavit was filed on 17-7-1990. The case was listed before the Court. Since the learned counsel for respondent No. 5 was not appearing before the Court, the Court was pleased to fix the case for 18th March 1991 peremptorily; on that date also the learned counsel for respondent failed to appear before the Court. The case is on the list today peremptorily as the first case. List has been received. Learned counsel for the respondent No. 5 is not present. I have heard the learned counsel for the petitioner as well as the learned standing counsel. A counter affidavit has been filed on behalf of the State of U.P. The fact that symbols were allotted initially in accordance with provisions of R. 20A of the Panchayats Raj Rules is admitted. It is not disputed that initially the symbol of horse (Ghora) was allotted to the petitioner and symbol allotted to respondent No. 5 was tractor. The polling was done on the same symbols. The controversy arose only on the date of counting of the ballots The learned counsel for the State has not shown any provision in the Act or the rule to indicate that the symbols once allotted can be changed subsequently at the time of election or at the time of counting of the ballots As stated earlier, the ballots were being counted by the returning officer when the respondent No 5 and his associates came and threatened him with dire consequences unless he declares respondent No 5 as successful candidate in the election This fact that respondent No 5 had threatened the returning officer is corroborated by the fact that immediately after the threats extended by the respondent No 5 information was sent by the returning officer to the election officer/District Magistrate who, in turn, had asked him to decide the matter according to his own conscience It appears that the returning officer was subdued and under coercion had to succumb to the wishes of the respondent No 5 In doing so, he obtained in writing from all other contesting candidates that the symbol allotted to respondent No 5 was horse (Ghora) and the symbol of the petitioner was tractor No such writing was given by the petitioner There is no provision in the Act or the Rule which may direct the returning officer to get such writing at the time of counting and after such writing the returning officer to declare the result on its basis The averments made in the writ petition have not been controverted by any counter affidavit on behalf of respondent No 5 There is no scope except to accept uncontroverted allegations of the petitioner

2 Learned standing counsel has placed one objection that the writ petition is not maintainable in view of the bar of alternative remedy of filing an election petition under S 12C(b)(ii) He suggests that the language of the section aforesaid, "by gross failure to comply with the provisions of this Act or the rules framed thereunder," covers the present case It was nothing but gross failure to comply with the provisions of the Panchayat Raj Act The election petition was the only remedy The petitioner was wrongly advised to come to this Court and file the present writ petition The submission of the learned standing counsel may have some force but in the facts and circumstances of the present case that the writ petition was immediately filed after the declaration of the result on 28 7 1988, and this Court was pleased to take cognizance of the matter and the counter affidavit was called for and the State of U P filed counter affidavit the submission has little force Further no such objection has been raised by the learned standing counsel in the counter affidavit filed by him on behalf of the State of U P It would not be fair for this Court after a lapse of more than 2½ years to drive away the petitioner to subordinate Court seeking relief of general procedure of election petition If such a course is adopted the persons who took law in their own hands and obtained a declaration in his own favour by creating such a situation that the returning officer was compelled to declare the result, it would lead to injustice rather to justice Learned counsel for the petitioner cited 1988 UPLBEC 218 (AIR 1988 All 151) Methodist Church in India v Bareilly Development Authority Bareilly in which the Division Bench of this Court observed that if it is found necessary for promotion of justice and prevention of injustice, which is the primary object of the constitutional provision the bar of alternative remedy would not operate for entertaining the writ petition Another case cited by the learned counsel for the petitioner is the 1990 UPLBEC 279 (1990 Lab IC 1173) Rajendra Pd Gond v D I O S Jaunpur In the said Division Bench case this Court after relying on AIR 1958 SC 86 AIR 1969 SC 556 and 1981 UPLBEC 61 (FB) negatived the bar of alternative remedy for entertaining the writ petition As observed above, the bar of alternative remedy of filing election petition raised at this stage after 2½ years will lead to injustice In the circumstances, the submission of the learned standing counsel is repelled

3 After hearing the parties, I am of the opinion that the impugned declaration of election result dated 7 6 1988 (Annexure 2 to the petition) is liable to be quashed The respondent No 3 is directed to proceed to

declare the result of the election treating the name of candidates and allotment of their symbols which was finalised on 25-5 1988 as legal and correct and after due notice to the parties shall declare the result of the successful candidate treating the symbol marks of hourse (Ghora) allotted to Virendra Singh and tractor' symbol allotted to Malkhan Singh The writ petition is allowed accordingly There shall be no orders as to costs. The respondent shall declare the result of the election in question within a period of one month of the filing of the certified copy of this judgment by the petitioner before him

Petition allowed

1991 ALL L J 807

= 1991 Cri L J 2138

H C MITAL AND G D DUBEY JJ

Khem Karan and others Appellants v State of U P , Respondent

Criminal Appeal No 483 of 1978, D/- 26-11-1990 *

(A) Penal Code (1860), Sections 302, 304 Part II, 323, 107, 114 and 34 — Murder — Appreciation of evidence — Instigation to commit murder — One of the accused instigating others to beat deceased — Can be convicted only under S 114 and not u/Ss 302 and 323 — Other accused inflicting lathi blows and instigating another to fire with pistol — Can be convicted u/S 304, Part II and not u/S 302

Where on protest by the deceased as to why the three accused persons abused his children one of them instigated the others, his two sons "Maro Saleko ' one of the sons inflicted lathi injuries and on that son's instigation the other son fired shot with pistol, the accused, father could be held guilty only for abetting an offence of causing simple injuries and not for an offence for instigation for the commission of the offence of murder The said words 'Maro Saleko ' which in the common language would mean 'to beat ' particularly mere protest of the deceased to the accused persons why they abused his children could not be a matter or circumstance to prompt the father to instigate his sons to kill the deceased Therefore, the Court could not charge nor find guilty the father of the offences u/Ss 302 and 323 read with S 34, I P C but only u/S 114, I P C Thus prima facie, an offence for instigation for the commission of the offence of murder is not made out and he can be held guilty for abetting an offence of causing simple injuries That apart it is not in the F I R that the father had also instigated his other son to fire shot with his pistol, but it is alleged that his first son had exhorted the other son to fire shot and, therefore the father cannot be held guilty of abetting the offence of murder He was simply to be convicted for instigating the offence u/S 323, I P C as the first son had only caused simple lathi injury on the head of the deceased His conviction and sentence, therefore, for the offence u/S 302 read with S 114, IPC are liable to be set aside (Paras 11, 12)

As regards the role of the first son, he had caused lathi injury on the head of the deceased He has also been convicted for the offence u/S 302 read with S 34 I P C According to the prosecution case as contained in the version of the deceased in the FIR when after receipt of the lathi injury he tried to escape, the accused first son exhorted the other son to fire, whereupon the latter had fired a shot as a result of which the deceased received a fatal injury resulting into his death Under the circumstances the intention to cause death be difficult to infer, but it can safely be inferred that the first son had knowledge that fire with the pistol was likely to cause death and, therefore, under the circumstances of the case conviction of the first son for the offence of murder u/S 302 read with S 34, I P C should not be upheld, but he is liable to be convicted for the offence u/S 304 Part II read with S 34 I P C In the result the accused first son s conviction u S 302, IPC read with S 34, I P C is liable to be set aside and he is held guilty instead u S 304, Part II read with S 34, IPC besides the offence u, S 323 IPC for causing simple lathi injuries to the deceased (Paras 13, 17, 18)

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*Against judgment and order of M Wahaj Uddin, Sessions Judge, Agra, D/- 14-2-1978

(B) Penal Code (1860), S 34 — Common intention — Pre arranged plan and criminal act in pursuance of such plan is necessary to constitute such intention

To constitute common intention it is necessary that there was a pre-arranged plan and the criminal act was done in pursuance to that pre-arranged plan The common intention to bring about a particular result may even develop on the spot in between a number of persons with reference to the facts of the case and circumstances of the situation Though common intention may develop on the spot it must however be anterior in point of time to the commission of the crime showing a prearranged plan and prior concert Undoubtedly it is a difficult thing to prove the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons But however difficult may be the task, the prosecution must lead evidence of facts, circumstances and conduct of the accused from which their common intention can be safely gathered In most cases it has to be inferred from the act or conduct or other relevant circumstances of the case in hand This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries caused by one or some of them (Para 16)

Cases Referred	Chronological	Paras
1972 Cri LJ 465 (SC)		16

G C Saxena for Appellants, Dy Govt Advocate for Respondent

H C MITAL, J — Of the above named appellant Gulta has died during the pendency of the appeal, hence his appeal stands abated

2 Khem Karan appellant stands convicted and sentenced u/Ss 302 and 323 both read with S 114 IPC to life imprisonment and six months R I respectively Appellant Tukman stands convicted and sentenced under Ss 323 and 302 read with S 34, IPC to life imprisonment and six months R I Appellant Gulta (now deceased) stood convicted and sentenced u/Ss 302 and 323 read with S 34 IPC to life imprisonment and six months R I

3 According to the prosecution in brief on 22-10-1976 at about 7 a m when Devi Ram (deceased) was coming from his field with fodder for the cattle in the way he met all the three appellants working in their field and on seeing them he asked them why did they unnecessarily indulge in abusing the children, whereupon Khem Karan exhorted his sons, the two appellants Gulta and Tukman "Maro Saleko Aaj Yah Bach Kar Na Nikal Pae Thereupon Tukman gave a lathi blow on the head of Devi Ram and when the later tried to run to save himself Tukman exhorted his brother Gulta to fire whereupon Gulta fired a shot with his country made pistol as a result of which he received pellet injuries in his stomach and fell down On hearing his cries his brother Ram Deen (P W 1), Bhagirath (P W 2) and others arrived They carried him on a cot to the police station Shamshabad at a distance of three miles, where at 9-30 a m on the dictation of Devi Ram (deceased) FIR (Ex Ka-13) containing the above facts was recorded and a case u/S 307, IPC was registered and he was sent for medical examination to the hospital The hospital at Shamshabad was closed and no Doctor was there, hence he was taken to Agra District Hospital, but before reaching there he died At 11-15 a m Dr B P Agarwal prepared Memo and sent it to S O Rakabganj, Agra about the dead-body lying in the hospital Thereafter S O Chetan Swarup from P S Rakabganj reached the hospital and prepared an inquest report and other necessary papers and sent the dead body for postmortem Autopsy on the dead body was conducted on the same day at 4-30 p m and the following injuries were noted

1 Multiple gun shot wounds of entry 1 8' x 1 8' x tissue deep and cavity deep on the abdomen starting from 1 above the umbilicus to both thighs upper third part, 12" from the upper part of the wound at the umbilicus to the thigh On front of abdomen lower part on the penis on the scrotum on the right thigh front and outer parts and on the left thigh front part there were wounds

2 Lacerated wound 1/2" x 4·10" x bone deep on the right side scalp 2½ above right eye

4 On internal examination multiple perforation by gun shot pellets were found in the small and large intestines and several pellets were recovered from the abdominal cavity According to Dr S C Sharma (P W 5) who had done the autopsy, the death was caused due to shock and haemorrhage as a result of the aforesaid fire-arm injuries

5 Investigation of the case was entrusted to and completed by P W 6 S I Indrajit Sharma, who after completion of the investigation submitted charge-sheet against the accused At the trial the appellants pleaded not guilty and the prosecution in all examined eight witnesses P Ws 1 and 2 are the eye witnesses of whom P W 2 Bhagirath did not support the prosecution case and was treated hostile P W 3 Prabhu Dayal is a witness of the inquest report P W 4 constable Phool Singh had brought Devi Ram injured to the District Hospital, Agra and after his death he had taken his dead body to mortuary for postmortem P W 5 Dr S C Sharma had done the autopsy on the dead body and has proved the postmortem report P W 7 Chetan Swarup S I had prepared the inquest report P W 8 Head constable Rajendra Singh has proved the FIR scribed by him at the dictation of the deceased and has further stated that he registered the case u/S 307 IPC and, therefore, on receipt of information about the death of Devi Ram case was converted into S 302 I P C, P W 6 S I Indrajit Sharma, I O deposed about the various steps taken by him in the course of investigation

6 In defence the accused did not adduce any evidence

7 Learned Sessions Judge believed the prosecution case and relied on the testimony of P W 1, the FIR recorded at the dictation of the deceased and statement u S 161 Cr P C of the deceased, both admissible u/S 32 of the Evidence Act, hence convicted and sentenced the appellants as already stated above

8 The main assailant Gulta has died during the pendency of the appeal and his appeal stands abated Now this appeal has been pressed on behalf of Khem Karan and Tukman, the other two appellants

9 In his report the deceased had stated that the appellants had incurred malice against him as a case against them for setting fire to an engine was pending hence they used to abuse his children whenever they used to pass near their field On that day at 7 a m when he was bringing fodder in the way he found these appellants working in their field and he asked them why they abused his children Thereupon at the exhortation of Khem Karan "Maro Saleko" Tukman wielded a lathi and when he tried to escape to save his life at the exhortation of Tukman Gulta fired with his country made pistol and on receipt of which he fell down and shouted On hearing his cries, his brother Ram Deen and Bhagirath arrived there In that view of his statement it is apparent that both Ram Deen and Bhagirath could have heard his cries after the fire of the shot as according to the deceased himself he had shouted after he received the shot Bhagirath (P W 2) who was declared hostile also stated the same that on receipt of the cries of Devi Ram when he reached there he found him lying on the ground with pellet injuries Ram Deen had also arrived there and then brought a cot and took him to P S Shamsabad He specifically stated that he did not see the appellants causing injuries His testimony is perfectly in tune with the contents of the FIR lodged by the deceased Devi Ram himself However, P W 1 Ram Deen had stated that while at

about 6-30 p m when he was going towards his field, near the field of the accused he saw blood oozing out from the body of the deceased and the appellants then surrounded him, that Tukman had stated "Sala Nikla Jata Hai Goli Maar Do", thereupon appellant Gulta fired a shot with his katta He does not at all say that he had reached there on hearing the cries of Devi Ram In view of the statement of the deceased in the FIR apparently there has been an improvement in the version of this witness to the effect that he had reached there earlier before the shot was fired at the behest of Tukman His testimony, therefore to that extent is not free from suspicion

10 There is no other evidence to show how the fight had started, except the statement of the deceased in the FIR as well as u/S 161, Cr P C The letter is nothing but a verbatim copy of the FIR and, therefore, there does appear to be force in the contention of the learned counsel for the appellants that the same appears to have been prepared by the Investigating Officer subsequently otherwise there would have been mention about that fact in the general diary of the police station when it contains the fact that the FIR was recorded at the dictation of the deceased the case was registered and along with Majrubi Chitthi the injured Devi Ram was sent for the examination of his injuries to the hospital Whether the statement u/S 161, Cr P C of the deceased is read or not is not at all material as its contents are the same as that of the FIR

11 On a plain reading of the FIR it is clear that per chance the deceased found the appellants working in their field and protested to them why they abused his children and thereupon the appellants had caused injuries to him According to the version of the deceased himself Khem Karan had only said to his sons "Maro Saleko" which in the common language would mean 'to beat particularly mere protests of Devi Ram to the appellants why they abused his children could not be a matter or circumstance to prompt Khem Karan his sons to kill Devi Ram The learned Sessions Judge also, therefore, did not charge nor found guilty Khem Karan of the offences u/S 302 and 323 read with S 34 IPC but only u/S 114, IPC S 107 reads as follows —

107 A person abets the doing of a thing who —

First — Instigates any person to do that things, or

Secondly — Engages with one or more other persons or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing, or

Thirdly — Intentionally aids by any act or illegal omission the doing of that thing

Explanation 1 — A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing

Explanation 2 — Whoever either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act

12 In the present case the allegation is only of instigation It has to be seen whether Khem Karan had instigated his sons to commit the murder As already stated above, prima facie the circumstances of the case did not at all have a cause to instigate for the commission of the offence of murder simply because the deceased had protested to Khem Karan why he abused his children The instigation could at most be for beating Hence in our view, against Khem Karan prima facie an offence for instigation for the commission of the offence of murder is not made out and he can be held guilty for abetting an offence of causing simple injuries That apart it is not in the FIR that Khem

Karan had also instigated Gulta to fire shot with his pistol, but it is alleged that Tukman had exhorted Gulta to fire shot and therefore, Khem Karan cannot be held guilty of abetting the offence of murder He was simply to be convicted for instigating the offence u/S 323, IPC as Tukman had only caused simple lathi injury on the head of the deceased His conviction and sentence, therefore for the offence u/S 302 read with S 114, IPC are liable to be set aside

13 As regards the role of the appellant Tukman it could not be doubted that he had caused lathi injury on the head of the deceased He has also been convicted for the offence u/S 302 read with S 34 IPC According to the prosecution case as contained in the version of the deceased in the FIR when after receipt of the lathi injury he tried to escape, this Tukman exhorted Gulta to fire, whereupon Gulta had fired a shot as a result of which the deceased received a fatal injury resulting into his death within four hours

14 The deceased had received the following gun shot injuries --

1 Multiple gun shot wounds of entry 1/8" x 1/8" x tissue deep and cavity deep on the abdomen starting from 1" above the umblicus to both things upper third part, 12" from the upper part of the wound at the umblicus to the thigh On front of abdomen lower part, on the penis, on the scrotum, on the right thigh front and outer parts and on the left thigh front part there were wounds

2 Lacerated wound 1/2" x 4/10" x bone deep on the right side scalp 2½' above right eye

15 It is clear that the injuries had been received in an area of 12" on the thighs and abdomen as has also been clearly shown in the postmortem report prepared by Dr S C Sharma, hence the shot must have been fired from a distance of at least six feet

16 To constitute common intention it is necessary that there was a prearranged plan and the criminal act was done in pursuance to that prearranged plan The common intention to bring about a particular result may even develop on the spot in between a number of persons with reference to the facts of the case and circumstances of the situation Though common intention may develop on the spot, it must, however be anterior in point of time to the commission of the crime showing a prearranged plan and prior concert In the case of Amrik Singh v State of Punjab 1972 Cri LJ 465 (SC) it has been held that though common intention may develop in course of the fight but there must be clear and unimpeachable evidence to justify that inference Undoubtedly it is a difficult thing to prove the intention of an individual and therefore it is all the more difficult to show the common intention of a group of persons But however difficult may be the tasks, the prosecution must lead evidence of facts, circumstances and conduct of the accused from which their common intention can be safely gathered In most cases it has to be inferred from the act or conduct or other relevant circumstances of the case in hand This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack the determination and concert with which the beating was given or the injuries caused by one or some of them

17 In the present case the accused had not arrived on the scene of occurrence with any determination and prior concert but they were already present there, working in their field and the deceased when he was passing that way accosted them as to why they abused his children and thereupon at the behest of Khem Karan Tukman had wielded a lathi blow and subsequently when the deceased tried to escape, at the behest of Tukman Gulta had fired a shot Considering the facts of the case that there could not be any prior determination or concert to kill the deceased, but when the deceased had virtually reprimanded by protest to the accused why they had abused his children the act was committed and Gulta at the behest of Tukman had fired the shot from a sufficient distance with a country made pistol Under the circumstances the intention to cause death be difficult to infer but it can safely be inferred that

Tukman had knowledge that fire with the pistol was likely to cause death and, therefore, under the circumstances of the case in our view conviction of Tukman for the offence of murder u/S 302 read with S 34, IPC should not be upheld, but he is liable to be convicted for the offence u/S 304, Part II read with S 34, IPC

18 In the result Tukman's conviction u/S 302, IPC read with S 34, IPC is liable to be set aside and he is held guilty instead u/S 304, Part II read with S 34, IPC besides the offence u/S 323, IPC for causing simple lathi injuries to the deceased

19 As regards the sentence he has been found guilty u/S 323 read with S 114 IPC He was aged 65 years of age in the year 1978 when he was tried and about 63 years of age when the occurrence took place, hence ends of justice would amply meet the sentence to the period already undergone by him as under trial and after his conviction till bail bond was granted

20 As regards Tukman we find that in his statement u/S 313, Cr P C he had given out his age as 16 years on 18-1-1978 The learned Sessions Judge subsequently specifically enquired his age and then again he repeated his age to be 15-16 years However, the learned Sessions Judge has made his observation that he appeared to be between 18 to 20 years The occurrence had taken place on 22-10-1976 Hence at the time of bail he was above 16 years, but was below 18 years positively

21 We accordingly set aside the conviction and sentence of Khem Karan u/S 302 read with S 114 IPC to life imprisonment, but maintain his conviction u/S 323 read with S 114, IPC but reduce it to the period already undergone

22 The conviction of other appellant Tukman is altered from u/S 302/34 to 304, Part II, IPC He has already undergone an imprisonment for over one year Considering that he was a young lad of about 17 years at the time of the occurrence and he has been at large for over nearly 12 years, in our opinion need not be committed to prison for any further period at this stage In this particular case we also do not at all think it necessary to direct the appellant to pay any fine in addition to the term of imprisonment he has already suffered particularly because the main assailant Gulta has died during the pendency of this appeal and his appeal stands abated

23 The conclusion, therefore, is that appeal of Gulta stands abated Khem Karan's conviction and sentence u/S 302/114, IPC are set aside His conviction is maintained u/S 323/114, IPC and his sentence is reduced to the period already undergone

24 Tukman's conviction u/S 302/34, I P C is altered to S 304, Part II/34, I P C, and the sentence is reduced to the period already undergone

Order accordingly

1991 ALL L J 812

= 1991 Cri L J 2239

G D DUBEY, J

Raj Bahadur Applicant v The State of U P, Opposite Party

C M B A No 12900 of 1990, D/- 17-12-1990

(A) Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Ss 37, 17/18 — Offence under — Bail — Parties — Government Advocate holds status of Public Prosecutor — Hence notice to Government Advocate amounts to notice to Public Prosecutor — State Government also made a party — Union of India not required to be made a party

Criminal P C (2 of 1974), S 24

(Paras 4, 7)

(B) Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Ss 50, 37 — Bail — Grant of — Grounds — Search and

recovery of brown sugar — Failure to summon public witnesses — Cannot be a ground for enlarging accused on bail

(Para 10)

(C) Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Ss 37, 17/18 — Offence under — Bail — Grant of — Regulated by provisions of S 37 — General provisions under Criminal P C — Not applicable

Criminal P C (2 of 1974), S 439

1989 Cri LJ 1412, 1990 Cri LJ 2058, Relied on (Paras 12, 13)

Cases Referred Chronological	Paras
1990 Cri LJ 2058	11
1989 Cri LJ 1165	10
1989 Cri LJ 1412	8

Mr Anup Ghosh for Applicant A G A, for Opposite Party

ORDER — This is an application for bail

2 On a search of the applicant 5 gm of brown sugar was recovered The applicant has been arrested in connection with an offence punishable under Section 17/18, N D P S Act (hereinafter referred to as Act)

3 It has been argued that the search was not in accordance with Section 51 of the Act It was also urged that public witnesses were not summoned to witness the search and recovery Lastly, it was urged that Section 37 of the Act is not applicable to the High Court Therefore, the High Court can look into the matter from its own angle

4 I have heard the learned A G A also He has raised the preliminary objection that the Union of India should be also made a party to this case because the Union of India has a cell to control the menace of Narcotic Drugs and Psychotropic substances

5 In reply to the above objection the learned counsel for the applicant has urged that the sole purpose of making the State Government or Union of India as a party to the petition is only to give an opportunity to the State Government or Union of India to oppose the application if they so like In this case the investigation is being done by the agency of State Government Hence the State Government has been made a party

6 In respect of matters relating to the Act the provisions of Section 37 of the Act deal with the bail and cognizance in respect of offences under the Act This section as amended up to this date reads as under —

37 Offences to be cognizable and non-bailable

(1) Notwithstanding anything contained in the Code of Criminal Procedure 1973 (2 of 1974)—

(a) every offence punishable under this Act shall be cognizable,

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail

7 The above quoted section only provides that the Public Prosecutor must be heard before any person can be granted bail Since notice had been given to the Government Advocate then it amounted to a notice to the Public Prosecutor, the Government Advocate holds the status of public prosecutor also In such a situation sufficient compliance has been made by impleading State Government as a party and giving

notice to the Government Advocate of this application The preliminary objection, therefore, has no force, at all Union of India is not required to be made a party

8 In respect of his first contention the learned counsel for the applicant has cited the State of Himachal Pradesh v Sudarshan Kumar 1989 Cri LJ 1412 It was held in this case by a Division Bench of Himachal Pradesh High Court that the designated officer is bound to inform person of his right to be taken without unnecessary delay to nearest Gazetted Officer or to nearest Magistrate to be searched in his presence It has been urged that in the recovery memo it has been mentioned at the end that after recovery the applicant had declined to avail the opportunity to get himself searched before a gazetted officer or a Magistrate It was urged that this was not a sufficient compliance It is not desirable to make any comment on this matter unless the officer recovering the incriminating material had been examined and had an opportunity to explain the text of his recovery memo Moreover Section 37 of the Act quoted above states that an accused can be bailed out only if he is able to show that no case is made out against him and that he will not repeat the offence

9 Whether there was any irregularity in the search is a matter of evidence It is not desirable to express any opinion on this aspect at this juncture

10 Relying upon Geeta v State, 1989 Cri LJ 1165 it was argued that mandatory requirement of Section 50(4) of the Act were not complied and the witnesses had not been summoned There is a note in the recovery memo cum first information report that no person of the locality had agreed to be a witness in the matter Whether even in such a circumstance the taking of a witness is mandatory is a matter for consideration by the lower Court This alleged lapse in compliance of Section 50 of the act cannot be a sufficient ground for enlarging the applicant on bail

11 In respect of the last contention regarding the applicability of Section 37 of the Act the learned counsel for the applicant has relied upon Anil Kumar v State of Maharashtra, 1990 Cri LJ 2058 This case law is not applicable to the matter It was based on different facts In this matter the case was triable exclusively by the Court of Session The Magistrate had granted bail in the case u/S 21 of the Act The learned Session Judge had cancelled the bail Considering this aspect of the matter a single Judge of the Bombay High Court had observed that the Session Judge has jurisdiction to entertain the application for cancellation of bail and provision of Section 439(2) of the Code of Criminal Procedure were applicable

12 In paragraph 11 of his judgment Hon M S Ratnaparkhi J had observed that at the stage of bail provision of Section 37 were applicable It was observed by him

"If we read S 37(1)(b)(ii) of the said Act, it virtually means that no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit such offence while on bail The Court has thus to satisfy itself with these two requirements before it can grant bail"

In paragraph 21 of judgment it was stated that provision of Section 439(2) of the Code of Criminal Procedure is not inconsistent with Section 37 of the Act hence the provision regarding cancellation were applicable Thus reading of this case law I find that it goes against the applicant There is no force in the contention that Section 37 is not applicable to the High Court

13 In 1989 Cri LJ 1412 (supra) it was held that Criminal Procedure Code is not applicable where any different procedure has prescribed by any law Since the Act prescribes a separate provision for bail the general provisions of bail under the Code of Criminal Procedure will not be applicable The applicant has to show that his case comes within ambit of Section 37 of the Act

14 Coming to the facts of this case it was urged by the learned counsel for the applicant that the Sub-Inspector was inimical to the proprietor of the shop where the applicant was working The applicant and one Omvir are said to have been working in the medical shop Annexures 2 to 4 are telegrams sent by the proprietor of the Medical Firm on 22-7-90, 29-7-90 and 11-10-90 alleging an apprehension from the hands of the Sub-Inspector Vikram Singh, Station House Officer, Police Station Rakabganj, District Agra It was argued that in the above circumstance the false implication of the applicant cannot be ruled out

15 It has been argued by the learned Deputy Government Advocate that it is not easy to get brown sugar and transplant It was also urged that the brown sugar is turning as a menace and as well a lucrative business and the telegrams appears to be a pre-thought of plan to avoid any possible arrest

16 Without expressing any opinion on the last contention I direct that the applicant be released on bail on his furnishing two adequate sureties and a personal bond each in the like amount to the satisfaction of the C J M Agra in Crime No 406 of 1990, u/S 17/18 of N D P S Act, P S Rakabganj, Agra

Application allowed

1991 ALL L J 815

= 1991 Cri L J 2268

N L GANGULY, J

Kishan Pal and another, Applicants v State of U P, Opposite Party

Criminal Misc Appln No 4731 of 1991, D/-2-4-1991

Criminal P C (2 of 1974), S 231 — Sessions trial — Closure of prosecution evidence — Application for filing documentary evidence, by prosecution thereafter — Not maintainable

Where in a Sessions trial the prosecution evidence had been closed and the prosecution had made an application for filing documentary evidence without supplying the copies of said documents and it was also not known whether the documents which were sought to be filed in evidence were such evidence which could be admitted without formal proof the order by the Magistrate permitting the filing of documents would not be proper

(Paras 1, 2)

Cases Referred	**Chronological Paras**
1953 Cri LJ 546 1952 All LJ 668 AIR 1953 All 197	1

Rajesh Kumar Sharma, for Applicants Standing Counsel, for Opposite Party

ORDER — In Sessions Trial No 228 of 1983, the prosecution evidence was closed After closing of the prosecution evidence before statement of the accused under S 313 of Cr P C was recorded and an application was filed by the prosecution for permission to file a number of documents in the case The application of the prosecution for filing of the documents was opposed by the accused persons on the ground that the trial is of 1983 and after a lapse of about 8 years The prosecution is now proposing to file certain documentary evidence in the case, which will, in other words, reopen the prosecution case and the accused shall be highly prejudiced in their defence The counsel for the State appears to have cited 1952 All LJ 668 (1953 Cri LJ 546) Munshi Singh v State, learned single Judge of this Court in the said judgment observed that the proceedings in the criminal trials are not like the proceedings in the civil court There is no fixed stage at which the documents to be relied by the prosecution has to be filed It was observed that the prosecution can produce its witnesses and file documents in any order it likes at any stage it likes After this observation, the learned Judge observed that (Para 3)

'When the prosecution is its own judge of the order in which witnesses are to be produced, it follows that documents which require to be proved can lawfully come on the record only when the witnesses who prove those documents are examined, and that therefore the stage for the coming on the record of the provable documents will be in the discretion of the prosecution, and the accused cannot force the prosecution to produce any documents at any stage In fact, even if a certain document which requires to be proved happens to be among the papers which are before the Court it would be the bounden duty of the court not to refer to that document until it has been duly proved and marked as an exhibit

The learned court below relying on the aforesaid observations of the case law, passed orders permitting the prosecution to file documentary evidence in the case The learned Judge has completely missed to note that the case cited was wholly distinguishable In the said case the prosecution evidence had not been closed whereas in the present case, the prosecution evidence has been closed As such, the observations made in the said judgment are not applicable to the present facts and circumstances of the case It is further important to note that the learned Judge has not exercised powers under section 311, Cr P C He has not felt any necessity of those documents which are now being filed by the prosecution for the proper adjudication of the case In fact it was only at the instance of the prosecution that the said documents were directed to be admitted on record As such, it cannot be argued that in exercise of powers of section 311 the Court has discretion to permit the prosecution to examine the said witnesses In view of the fact that for the present trial, it shall not be open for the Court to ask for prosecution the documents as material evidence required under section 311, Cr P C

2 The prosecution has neither supplied the copies of the documents which they propose to file at this stage, after closing of the evidence nor is there any mention of those documents in the order impugned It is also not known whether the documents which were sought to be filed in evidence were such evidence which could be admitted without formal proof In the facts and circumstances, I consider that the order impugned cannot be allowed to stand and is liable to be quashed It is not fair that the prosecution may take advantage of the delay in proceedings They have already consumed more than 9 years in prosecution of the case which is pending in the court below since 1982 and now the said additional evidence is sought to be adduced In criminal cases, the principle of compensating the other side by paying money is not always applicable The lower court below was not correct in saying that an amount of Rs 100/- would suffice the ends of justice to permit the prosecution to adduce the evidence In view of the facts and circumstances, the order impugned is set aside and petition under S 482, Cr P C allowed

3 I heard the learned counsel for the State as well as the applicants counsel and on their statement, this petition is being finally allowed without admitting it

4 A certified copy of the order be given in 48 hrs on payment of usual charges

Petition allowed

1991 ALL L J 816

= 1991 Cri L J 2286

S C VERMA, J

Sri Vidya Sagar, Petitioner v IIIrd Additional District Judge, Dehradoon and another Respondents

Civil Misc Writ Petn No 19013 of 1989, D/-24-4-1991

(A) Contempt of Courts Act (70 of 1971), S 2(b) — Civil contempt — Purpose of — It is not only to punish contemner, but to ensure obedience to orders of Court — Release of premises granted — Landlady giving undertaking to put tenant in possession on reconstruction of premises — Tenant filing application for compliance of order — Held, Court should have taken steps for compliance of undertaking

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FI/OI/A628/91/SNV

U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S 21(1)(a)

The purpose of Civil contempt is not only to punish a contemner but also to exercise enforcement and obedience to the orders of the Court (Para 9)

Where the landlady had given an undertaking to the Court when her application u S 21(1)(a) of U P Rent Act, 13 of 1972 for release of premises was allowed that the tenant would be put in possession after reconstruction of the premises and the Court, on application of the tenant for compliance of the order of the Court mainly engaged his attention on exonerating the landlady from punishment for contempt but had not taken any steps for compliance of the undertaking given by the landlady, the Court was directed to take steps for compliance of the undertaking (Paras 9, 11)

(B) Contempt of Courts Act (70 of 1971), S 2(b) — Civil contempt — What is —Breach of undertaking given to Court — It is prima facie civil contempt

Any wilful disobedience to the orders of the court to do or abstain from doing any act or breach of any undertaking given to the Court, is prima facie Civil contempt The reason why breach of the undertaking given to the Court amounts to contempt is that a contemner by making false representation to the court obtains benefit for himself and if he fails to honour the undertaking he plays serious fraud on the court itself and thereby obstructs the course of justice and brings into disrepute the judicial institution (Para 8)

Ranjit Saxena, for Petitioner Standing Counsel Janardan Sahai, for Respondents

ORDER — By this petition the petitioner has prayed for a direction to the respondent No 1 to ensure immediate compliance of the undertaking given by the respondent No 2 in Rent Control Appeal No 10 of 1981

2 In short the facts of the case are that the Prescribed authority by an order dated 5th January 1981 rejected the application of the landlady for release of the premises under S 21(1)(b) of the Act Learned District Judge on appeal allowed the application for demolition and reconstruction of the building within six months of the eviction by the tenant The portion in dispute is one residential room apartment including one Verandah, Kitchen, bath room and latrine in the occupation of the petitioner for the last 25 years on monthly rent of Rs 8 75 and the remaining portion of the house is in actual occupation of the landlady and her family members

3 The tenant applied for review of the order dated 21-1-1982 and after exchange of the affidavits the review petition was disposed of by an order dated 20-3-1982 The relevant portion of which is being quoted below

The applicant Sri Vidya Sagar has handed over the key of the tenanted portion to the opposite party in court He has vacated the tenanted premises in consonance with order dated 20-1-1982 in R C Appeal No 10 of 1981

The applicant Sri Vidya Sagar stated that he has already taken over the possession of the alternative accommodation situated at 49-Moti Bazar, Dehradun which carried a rent of Rs 50 - per month Sri Virmani states that the opposite party shall pay rent of the said premises on behalf of the applicant for six months during which tenanted disputed premises shall be constructed Sri Virmani further stated that in case the reconstruction takes a little longer than six months the opposite party shall continue to pay the rent of 49-Moti Bazar, Sri Virmani also stated that after reconstruction the applicant shall be let into reconstructed premises and shall be entitled to remain in same without notice and without permission of the landlord Sri Virmani also states that such entry shall be deemed to be re-allotment of the premises in favour of the applicant Sri Vidya Sagar u/S 24 of the U P Act No 13 of 1972 The rent of the newly constructed premises shall however be determined afresh in accordance with law The applicant Sri Vidya Sagar agrees with these terms

Sd - D L Agarwal,
District Judge,
Dehradun,
20-3-1982

ORDER

The review petition is decided accordingly in the light of the clarification and agreement of parties as mentioned above

The order dated 20-1-1982 in R C appeal No 10/81 shall therefore be read in the light of these clarifications and agreement

There is no dispute that the tenant vacated the premises and occupied 49-Moti Bazar, Dehradun After the building was reconstructed the Additional District Magistrate, passed an order dated 25-2-1983 allotting the premises in favour of the petitioner in case No 23 of 1982 u/S 24(2) of U P Act No 13 of 1972

3A The landlady by notice dated 29-6-1982 informed that she has spent about Rs 16000/- in the reconstruction of the portion in occupation of the tenant and she is entitled to rent of Rs 160/- per month excluding taxes The tenant was also required to deposit one month advance rent and thereafter possession was to be delivered Para 6 of the said notice is being quoted below

"6 That if you take possession as agreed upon in the judgment dated 20th March 1982 it shall be treated that you have agreed to the aforesaid rent which is determined according to law at the rate of Rs 160/- per month excluding taxes

This is to call upon you to deposit one month advance to my client and obtain receipt for the same and after obtaining receipt you are permitted to take possession of the tenanted accommodation Otherwise also if you take possession of the tenanted accommodation you are required to remit the rent by Money Order at the aforesaid rate to my client "

The landlady further insisted by telegram dated 14-9-1982 for payment of Rs 160/- per month and advance and thereafter possession was to be delivered

4 The petitioner sent notice dated 21-2-1983 and also sent by Money Order of Rs 115-00 and requested for delivery of possession The petitioner sent another notice dated 12th March 1983 Both these notices are on record and were received by the landlady The landlady sent a reply dated 4-3-1983 to the letter dated 21-2-1983 By this letter she informed that she had prayed for enhancement of rent as determined by the Additional District Magistrate and she further claimed water tax and sewer tax etc In reply to the letter dated 12-3-1983 she reiterated her stand and alleged that she is prepared to fulfil her obligation under the undertaking but the tenant will have to pay water tax, house tax and sewer tax etc as also rent which is ultimately to be determined Thus it appears that the landlady was insisting for payment of rent of Rs 160/- per month initially and thereafter for payment of rent which is to be finally determined by the authorities plus taxes etc and the possession was to be delivered only after advance rent was paid The tenant having failed in his attempts to get the possession, filed application dated 19-3-1983 in the court of District Judge for compliance of the order dated 20-3-1982 passed on the basis of undertaking furnished by the landlady This application was contested by the landlady by filing a detailed reply dated 21-5-1984 in which it was asserted that the tenant himself is responsible for not taking possession of the building even though landlady was always prepared to fulfil her obligations under the undertaking In the reply it was stated that in the notice dated 29-6-1982 it was made clear that the tenant should obtain necessary allotment order under the provisions of the Act and pay Rs 160/- per month 'It was admitted that in a case under S 30 of the Act the tenant deposited rent at the rate of Rs 115/- per month It was further stated that the rent of portion of the building was ultimately determined at Rs 122/- per month and according to enhanced rent plus taxes the total amount

comes to Rs 144 91 The landlady was always prepared to deliver the possession but the tenant did not pay the aforesaid amount

5 Learned Third Additional District Judge considering the aforesaid facts held that it cannot be accepted that the landlady ever refused to comply with the directions contained in the order dated 20-3-1982 or she wilfully committed any default in its compliance The application of the petitioner dated 19-3-1983 was rejected by an order dated 13-3-1989

6 The present petition has been filed under Art 226 of the Constitution for quashing the order dated 13-3-1989 and also for suitable directions to the respondent No 1 to ensure compliance of the undertaking given by the respondent No 2

7 I have heard Sri Ranjit Saxena learned counsel appearing on behalf of the petitioner and Sri Janardan Sahai appearing on behalf of the respondent No 2

8 Any wilful disobedience to the orders of the court to do or abstain from doing any act or breach of any undertaking given to the court, is prima facie Civil contempt Civil Contempt arises in cases where power of the court is invoked and exercised to enforce obedience to the orders of the court Considering the orders passed by learned District Judge dated 20-3-1982 it cannot be construed that the order passed was a consent order or a compromise decree and for whose non-compliance, appropriate action can be taken under Civil Procedure Code In this case it is clear that it was an undertaking given to the court and apart from the power to punish for contempt it was also obligatory on the court to have taken necessary steps to enforce obedience of the undertaking, given to the court The reason why breach of the undertaking given to the court amounts to contempt is that a contemner by making false representation to the court obtains benefit for himself and if he fails to honour the undertaking he plays serious fraud on the court itself and thereby obstructs the course of justice and brings into disrepute the judicial institution

9 Learned Third Additional District Judge on considering the facts and circumstances of the case came to the conclusion that the landlady had not committed any wilful disobedience to the orders nor she has done any act to obstruct the compliance of the order It may be that respondent No 2 may not have committed any act which may be punishable for contempt of court but the learned District Judge has not considered the other aspect of the matter with regard to the execution and compliance of the undertaking given by the landlady to the court The purpose of Civil contempt is not only to punish a contemner but also to exercise enforcement and obedience to the orders of the court I am constrained to note that the learned District Judge did not consider this aspect of the matter and did not take any steps for compliance of the undertaking given by the landlady to the court The learned Judge mainly engaged his attention to exonerate the landlady from punishment of the contempt and did not care to take necessary steps for obedience and compliance of the orders of the court

10 The facts of the case make it clear that the petitioner is entitled to possession and also to pay the rent as determined by the authorities but advance payment of rent cannot be made a condition precedent for delivery of possession The tenant was liable to bear the consequences as provided under the U P Act No 13 of 1972 in case he did not pay the rent it is true that both the parties have suffered and equities have to be adjusted The landlady was deprived of some rent and the petitioner his possession from 1983 up to this date even though the building was completed within stipulated period and proceedings for allotment etc were all completed before March 1983 It was also not very proper for the learned Judge to have kept this matter pending for six years

11 For the aforesaid reasons the order dated 13th March 1989 passed by the Third Additional District Judge, Dehradun, is

liable to be set aside The petition is allowed and the learned District Judge is directed to pass appropriate orders on the basis of observations made above and in accordance with the law The learned District Judge is directed to dispose of this matter within six weeks of a certified copy of this order being placed before him

12 There shall be no order as to costs

Petition allowed

1991 All L J 820

= 1991 Cri L J 2289

H C MITAL AND K NARAYAN, JJ

Rama Kant and others, Appellants v State of U P, Respondent

Criminal Appeal No 1652 of 1985, D/- 26-2-1991 *

Penal Code (45 of 1860), Ss 34, 149, 302 — Murder — Unlawful assembly — Guilt proved beyond reasonable doubt against three accused only — Benefit of doubt given to other two — Accused can be convicted under S 302, read with S 34 and not under S 302 read with S 149

Where five accused were charged for an offence under S 302 read with S 149 but from evidence on record the guilt was proved beyond reasonable doubt against three accused only and benefit of doubt was given to other two accused, the conviction of three accused could be altered from under S 302 read with S 149 to S 302 read with S 34

(Para 15)

R L Verma for Appellants Dy Govt Advocate and A Ram for Respondent

JUDGMENT — All the above named appellants stand convicted under Section 302 read with Section 149, I P C and sentenced to life imprisonment Appellants Ramakant, Satyapal and Banwari have further been convicted under S 148 I P C and Ram Niwas and Subedar under S 147 I P C and all these have been further sentenced to one year R I each The sentences have been ordered to run concurrently

2 The prosecution case in brief is that appellant Ramakant was being prosecuted for the murder of Dinesh Chapram in which Ram Raj deceased was a witness Ramakant had threatened Ram Raj not to give evidence against him He had made a report to the police and since then the appellant had a serious grouse against him It is alleged that on 30-10-1983 at about 4 P M when informant P W 1 Bhagwan Deen and his brother Ram Raj deceased were returning from their field with a load of fodder and reached to the north of the grove of Siya Ram on the Pagdandi appellant Ramakant, Satyapal and Banwari armed with guns, Ram Niwas and Subedar armed with Lathis suddenly appeared from behind and challenged Ram Raj Ram Niwas and Subedar shouted, ISKE BARE DIMAGH KHARAB HAIN SALE KO JAAN SE MAAR DO BACHNE NA PAWE", thereupon Ramakant, Satyapal and Banwari Lal fired at his brother on his back as a result of which he fell down and died after some time On hearing the alarm and gun shots, witnesses Daya Ram Chhotey Lal, Mitthu Lal and many others from the village arrived The assailants managed to make good their escape The F I R of the occurrence was lodged at 6 30 P M on the same day at P S Kanth, District Shahjahanpur at a distance of six miles On the basis of the F I R case was registered against the appellant and the Investigating Officer arrived at the scene of occurrence, prepared inquest report and sent the deadbody for postmortem which was conducted by Dr U D Kapoor who noted the following injuries vide postmortem report (Ex Ka-2)

Ante Mortem Injuries —

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*Against judgment and order of Brahma Singh, 3rd Addl Sessions Judge Shahjahanpur, D/- 17-6-1985

1 Abrasion 3 cm x 1 cm on the left upper arm 4 cm below left shoulder joint

2 Abrasion 4 cm x 2 cm on the lateral side of left elbow joint 3 cm above left elbow joint

3 Lacerated wound 12 cm x 6 cm on the left scapular region extending over to its back left upper arm upper part skin subcuteneous tissues part of muscle over the wound was missing Half of the wound over scapular got inverted margins Portion of wound front over back and upper arm had averted margins No blackening and no charring

4 Six fire-arm wounds on entry in an area of 9 cm x 4 cm over the right side of back extending up to right glutal region Margins inverted and lacerated No blackening No charring present Each wound of size of 0 7 cm x 0 75 cm x abdominal cavity deep

5 One fire-arm wound 1 cm x 1 cm in front of abdomen about 6 cm below umblicus

6 Two fire-arm wounds each of size of 1 cm x 1 cm on left side of front of abdomen at the level of umblicus Margins averted

On internal examination stomach and intestines were badly lacerated Kidney was also lacerated Three big pellets were recovered 8 ounces semi-digested food was present in the stomach After completion of the investigation these accused were charge-sheeted, committed and at the trial prosecution in all examined five witnesses of whom P W 1 Bhagwan Deen and P W 2 Daya Ram are the eye-witnesses of the occurrence P W 3 constable Dhiraj Singh had taken the dead-body for postmortem P W 4 Inspector P C Pathak was the Investigating Officer and deposed about the various steps taken by him during the course of the investigation Lastly P W 5 Dr U D Kapoor had done the autopsy on 31-10-1983 on 12 45 P M and has proved the injuries and other facts found by him at the time of postmortem as noted above He has further stated that the death was caused on account of shock and haemorrhage as a result of the antemortem injuries and the same could have taken place on 30-10 1983 at 4 P M

3 Version of the appellants has been that they had been falsely implicated on account of enmity, that they have also denied that the deceased was a witness in the murder case of Dinesh Chaprasi Ramakant has however, admitted that he was an accused in that case It is further alleged that the deceased himself was a man of bad character and therefore, was killed by some other person

4 In defence appellant Banwari examined himself on oath as D W 1 and deposed that after the case his wife Smt Rama Devi, Ram Charan Sri Kishan Babu Ram and Satyapal had made a complaint against the Investigating Officer Inspector P C Pathak and he proved the two applications (Ex Kha-2 and Kha-3) He also proved the application of Satyapal (Exs Kha-4 and Kha-5) He is also an employee of the Jail Learned Trial Judge, however believed the prosecution evidence and disbelieved the defence version, hence convicted and sentenced the appellants as above On being aggrieved this appeal has been preferred Learned counsel for the appellants argued that the evidence on record is not free from suspicion and not sufficient to bring home guilt to the appellants and, therefore, they are entitled to acquittal

5 Regarding motive, on behalf of the prosecution besides the oral statement of P W 1 Bhagwan Deen brother of the deceased that Ramakant was an accused in the murder case of Dinesh Chaprasi and that Ramakant, Banwari Lal and Satyapal had threatened his brother that if he would give evidence they would kill him He also proved Ex Ka-1 the report written by Ram Raj to the Senior Superintendent of Police On the basis of that report, Ex Ka-6 Chick F I R was prepared It is dated 8-8-1983 and it is stated that at 3 30 P M the incident is alleged to have taken place on 7-8-1983 at 7 P M in the evening The report was lodged against Ramakant, Satyapal, Maharaj Sahai and Banwari Lal Daya Ram and Natthu were named as witnesses Thus, the fact that such report was made by the deceased Ram Raj about two and a half months prior to the occurrence stands fully proved

6 On behalf of the defence it was also challenged that the deceased was not a witness in the murder case of Dinesh Chaprasi against Ramakant P W 1 Bhagwan Deen his brother stated that he knew about it only because the deceased had so told him However, the prosecution in support of it has also filed Ex Ka-17, certified copy of the charge-sheet in that murder case of Dinesh Chaprasi against Ramakant and therein at serial No 21 of the list of witnesses name of Ram Raj deceased has been mentioned The prosecution has thus established beyond doubt that appellant Ramakant was an accused in the murder case of Dinesh Chaprasi and therein deceased Ram Raj was a witness and that Ramakant, Banwari and Satyapal appellants had threatened the deceased not to give evidence, otherwise they would kill as contained in the report (Ex Ka-1) submitted by Ram Raj-deceased to the Senior Superintendent of Police

7 The occurrence had taken place at about 4 P M when Ram Raj deceased and his brother Bhagwan Deen were returning from their field each with a load of fodder and when they reached to the north of the grove of Siya Ram, the appellants waylaid the deceased and thereupon Ram Niwas exhorted them to kill and then Ramakant, Satyapal and Banwari had fired shots at the deceased on his back, as a result of which he fell down and died immediately thereafter On behalf of the appellants the time and place of the occurrence were not challenged in the cross-examination of P W 1 Bhagwan Deen and that of P W 2 Daya Ram, the two eye-witnesses

8 On behalf of the defence it was urged that P W 1 Bhagwan Deen was the real brother of the deceased and Daya Ram was also an interested witness and, therefore, their testimony was not worthy of credence No doubt, P W 1 Bhagwan Deen is the real brother of the deceased His testimony cannot be discarded on that account alone, but it has got to be carefully scrutinised To determine his presence at the scene of occurrence there is ample corroboration as the Investigating Officer did find two heaps of fodder at the scene of occurrence According to Bhagwan Deen he along with his brother was then returning from their field each with a load of fodder when the occurrence had taken place at that place P W 2 Daya Ram has also deposed that at that time P W 1 Bhagwan Deen and deceased Ram Raj were coming with a load of 'Chara' of Bajra on their heads The fact that both were coming with loads of 'Chara' on their heads and those two loads were found on the spot was not even challenged in the cross-examination of P W 2 Daya Ram Statement of the Investigating Officer (P W 4) Inspector P C Pathak also stands uncontroverted on that point It was, however, asked from him whether he had inspected the field from where they had gathered the Chara, he stated that he did see it, but he had not shown that fact in the site-plan

9 The testimony of these witnesses was also sought to be challenged on the ground that the injuries as noted on the person of the deceased could not be caused when the assailants were standing in the 'Khai' two and a half feet deep from where it is alleged that they had fired The injury No 3 lacerated wound 12 cm x 6 cm on the left scapular region extending over to the back left upper arm, upper part skin, subcutaneous tissues and part of muscle over the wound was missing completely Half of the wound over scapular got inverted margins and portion of the wound front over back and upper arm had averted margins without any blackening and charring clearly indicate when read along with the Naksha Lash (Ex Ka-12) wherein this injury has been shown that such type of chiselled grated injury could be caused by pelets only if the shot had been fired while the assailant was standing at a sufficient lower level Dr U D Kapoor (P W 5) who had done the autopsy had however, stated that the direction of injury No 3 was neither upward nor downward and the same would have been caused when the assailant was standing on the same level Prima facie the Doctor has not correctly appreciated the direction of the injury as described by him in

injury No 3 which clearly describes that the wound of entrance was on the left scapular region and its exit portion was towards left upper arm upper part skin and then on the upper part of the skin of the arm subcutaneous tissues and part of the muscle were missing, i e the upper part of the left arm over the scapular region had been completely removed as a result of the injury and the description of the injury as given in the Naksha Lash (Ex Ka-12) more correctly gives an idea of the same

10 Of course, injury No 4 had a straight wound resulting into two exit wounds, Nos 5 and 6 as follows —

4 Six fire-arm wounds on entry in an area of 9 cm x 4 cm over the right side of back extending up to right glutton region Margins inverted and lacerated No blackening No charring present Each wound of size of 0 7 cm x 0 75 cm x abdominal cavity deep

5 One fire-arm wound 1 cm x 1 cm in front of abdomen about 6 cm below umblicus

6 Two fire-arm wounds each of size of 1 cm x 1 cm on left side of front of abdomen at the level of umblicus Margins averted

These injuries could not have been caused if the assailant had been standing on the same level unless he had placed the butt of his gun at the level of his abdomen and kept the barrel straight and such position is seldom taken at the time of firing If the assailants were standing in the Khai two and a half feet below the level of the deceased, then of course the barrel could be in a straight line to the waist and abdomen of the deceased

11 The two abrasion injuries Nos 1 and 2 would have been caused as a result of stray pellets of the shot which caused injury No 3

12 On behalf of the appellants it was also urged that though it is alleged that all the three appellants namely, Ramakant, Satyapal and Banwari had fired four shots, but the injuries to the deceased indicate that only two shots were fired, but on that ground the eye-witness account cannot be discarded as the possibility that one of the shots of the gun of the appellants might not have hit the deceased

13 Thus, a close scrutiny of the injuries found on the person of the deceased also corroborates the eye-witness account of P W 1 Bhagwan Deen and there is no reason to doubt the testimony simply because he is a brother of the deceased

14 As regards participation of the other two appellants, namely Ram Niwas and Subedar they are alleged to be armed with Lathis and had not used the same, but to Ram Niwas role of exhortation has been assigned by Bhagwan Deen alone Daya Ram (P W 2) has, however, stated that all these five appellants had challenged when he passed that way, but in his cross-examination in paragraph 9 he has stated as follows —

EK KE BAAD TEEN FIRE SUNE TEEN FIRE SUN KAR MAIN DAR GAYA MAINE WAHIN KHARE HOKAR KAHA KI KAUN AADMI HAI TO BHAGWAN DEEN NE KAHA KI RAMAKANT, SATYAPAL WA BANWARI HAIN'

From the above statement of P W 2 Daya Ram it is thus clear that only names of these three appellants were told to him by Bhagwan Deen He did not name Ram Niwas and Subedar also among the assailants Hence these two appellants are entitled to be given benefit of doubt

15 The conclusion, therefore, is that from the evidence on record only guilt under S 302 read with S 34, I P C has been brought home beyond reasonable doubt against Ramakant, Satyapal and Banwari appellants only, hence they are liable to be convicted under S 302 read with S 34, I P C and not under S 302/149 I P C and also under S 148, I P C as presence of the other two appellants Ram Niwas and Subedar has been treated with doubt and it is not mentioned in the F I R that besides these appellants two other persons were also among the miscreants Conviction of Subedar and Ram Niwas under Ss 147, 302/149, I P C and their sentence thereunder are hereby set aside They are on bail they need not surrender Their bail bonds are cancelled and sureties discharged

16 Appellants Ramakant Banwari and Satyapals conviction is altered from Section 302 149 to S 302 34, I P C and their sentence for life imprisonment is confirmed Their conviction and sentence under S 148 I P C are set aside Their bail is cancelled They shall surrender to serve out their sentence forthwith

17 Copy of the order be sent to the C J M and the learned Sessions Judge Shahjahanpur for getting the appellants apprehended and sent to jail

Order accordingly

1991 ALL L J 824

= 1991 Cri L J 2293

(LUCKNOW BENCH)

D K TRIVEDI, J

Ghanshyam Applicant v State of U P and another, Opposite Parties

Criminal Revn No 339 of 1982 D/ 4-10-1989

Prevention of Food Adulteration Act (37 of 1954), Ss 13(2), 23 — Prevention of Food Adulteration Rules (1955), R 9 A

Report of public analyst — Furnishing of — Delay — Report though sent within prescribed time, sent after recording of prosecution evidence — Not a case of delay but non-sending of report — Accused deemed to be prejudiced — Trial vitiated

Rule 9-A provides that local authority shall after the institution of prosecution send a copy of the report of the result of public analyst by registered post or by hand to the person concerned The legislature has provided that report be sent within 10 days Delay of some days may not vitiate the case but it does not mean that the result of report of public analyst be sent to the accused by registered post after recording of the prosecution evidence Thus, where report of analysis was sent within ten days but was sent after recording of prosecution evidence, at a belated stage it was case of non-sending of report and accused deemed to have been prejudiced was entitled to be acquitted

(Para 9)

I Murtaza Suresh Chandra Yadav S C Bajpai, Mahesh Chandra and U P Singh, for Applicant Govt Advocate, for Opposite Parties

ORDER — This revision petition is directed against the judgment and order dated 15-7-1982 passed by Sri R S Pandey IVth Additional Sessions Judge, Rae Barli whereby he had maintained the conviction and sentence of the petitioner under Ss 7/16 of the prevention of Food Adulteration Act

2 The prosecution case is that on 23-2 1981 at about 12 O Clock Sri Ram Shanker Food Inspector visited the shop of the applicant at Furshatganj district Rae Bareli and purchased the sample of Jeera for being sent to Public Analyst After observing necessary formalities, he sent the said Jeera to the Public Analyst to Government of Uttar Pradesh, Lucknow who found the sample of Jeera adulterated According to report, the said Jeera contains stranuous matter which exceeded the prescribed maximum limit of ? per cent After receipt of the report a complaint was filed against the applicant

3 The complainant in order to prove its case examined two witnesses, namely, P W 1 Ram Shanker Food Inspector and D W 2 K P Srivastava The Judicial Magistrate, Special Court, Rae Bareli by his order dated 26-11-1981 convicted the applicant under Ss 7/16 of the Prevention of Food Adulteration Act (hereinafter referred to as the Act) and sentenced him to 6 months' rigorous imprisonment and further awarded a fine of Rs 1000/-

4 Aggrieved by the said order and judgment the applicant filed an appeal but the

same was also dismissed by the IVth Additional Sessions Judge Rae Bareli on 15-7-1982 Aggrieved by the said judgment and order the applicant filed the present revision

5 I have heard the learned counsel for the applicant as well as the learned Government Advocate

6 The main contention of the revisionist is that there is a violation of provisions of S 13(2) read with R 9-A of the Act and, therefore, the revisionist is entitled to be acquitted I find force in it S 13(2) provides that on receipt of the report of the Public Analyst that the food is adulterated, the local authority shall after institution of the case, forward a copy of the result of the report to the person from whom sample had been taken informing him that if he so desired then move an application to the Court within 10 days from the date of receipt of the copy to get the sample analysed by the Central Food Laboratory Section 13(2-A) provides that on application of a person, Court shall require the local authority to send the same sample to Central Food Laboratory for examination within 5 days Sub-section 2(B) provides that Director of Central Food Laboratory shall send his report to Court concerned within one month Finally Section 13(2) says that certificate issued by the Director of Central Food Laboratory shall be final and conclusive evidence of the fact stated therein The above mentioned provisions of law itself shows that legislature in order to protect the interest of the person made these provisions and further provides the time on each and every step in order to avoid any delay No doubt it can be said that the time provided in these Sections is not mandatory but unnecessary delay will cause prejudice to the person from whose custody sample has been taken The authority therefore, must be conscious in prosecuting the person and in complying the provisions of Prevention of Food Adulteration Act Similarly, R 9 provides certain duties of the Food Inspector R 9-A provides that Food Inspector shall send the report of the Public Analyst to the person from whom the sample has been taken by registered post R 9-A was inserted in 1977 Before R 9-A, there was a R 9-J which imposes a duty on the Food Inspector to send the result of report of the Public Analyst by registered post Originally, under R 9-J, a copy of the result of report of the Public Analyst would be sent by registered post or by hand to the person concerned as soon as the case was instituted in the Court R 9-J was amended and after amendment it was provided that the result of the report of the Public Analyst is to be sent by registered post within 10 days of the receipt of the report by Public Analyst R 9-J was deleted vide G S R 4(e) dated 4-1-1977 and R 9-A was inserted by G S R 4(e) published in the Gazette of India extraordinary dated 4-1-1977, R 9-A reads as follows —

9-A Local (Health) Authority to send report to person concerned The Local (Health) Authority shall (within a period of ten days) after the institution of prosecution forward a copy of the report of the result of analysis in Form III delivered to him under sub-rule (3) of R 7, by registered post or by hand, as may be appropriate, to the person from whom the sample of article was taken by the Food Inspector and simultaneously also to the person, if any, whose name, address and other particulars has been disclosed under S 14-A of the Act

Provided that where the sample conforms to the provisions of the Act or the rules made thereunder, and no prosecution is intended under sub-s (2) or no action is intended under sub-sec (2-E) of S 13 of the Act the Local (Health) Authority shall intimate the result to the vendor from whom the sample has been taken and also to the person, whose name address and other particulars have been disclosed u/S 14-A of the Act, within 10 days from the receipt of the report from the Public Analyst

Rule 9-A further amended in July, 1984 and word "immediately was substituted by the words 'within a period of 10 days' It appears that there was a conflict of opinion of different High Courts on the question of word immediately Therefore, in order to clarify the ambiguity, the legislature by amendment, provided that the result of report be sent within 10 days The history of R 9-A as mentioned above shows that legislature wants that the result of the report of Public Analyst be given to the accused within an early date so that he may be able to move an application before the Court concerned for sending of sample to Director of Public Analyst The object of S 13(2) read with R 9-A is that accused should have a fair chance of defence and also to meet the case instituted against him The above mentioned provisions are safeguards and they protect the persons against any improper action on the part of the prosecuting agency It provides an opportunity to the accused to send the sample to the Director of Central Food Laboratory for a certificate u/S 13(2) of the Act

7 From the perusal of the abovementioned provisions of law, there is no dispute that provisions of S 13(2) and R 9-A must have been complied with so far as the furnishing of a copy of the report to the accused is concerned and non sending of result of the report to the person from whom the sample had been taken vitiated the trial As regards the delay is concerned, the said delay may not be fatal unless and until it is proved that by this delay, accused was prejudiced The violation of time limit of 10 days as laid down by R 9-A does not necessarily vitiate the proceedings unless and until accused who proves that he was prejudiced by this delay No-doubt, delay of some days may not vitiate the trial but if the accused from the circumstances of the case proves that he could not take action for sending the report to the Director of Central Food Laboratory due to delay of receipt of the result of the Public Analyst then also, in my opinion, trial vitiates and accused will be entitled to be acquitted

8 The provision of Food Adulteration Act provides penalties of imprisonment for not less than 6 months and a fine not less than Rs 1000/- Keeping the severity of the sentence, in my opinion the legislature intended that the right of liberty of person should also be safeguarded With this view the legislature had imposed several duties on the Food Inspector as well as on the concerned department so that the accused should have a fair chance in defending the case and further to defend his case against any improper action on the part of the complainant On the question of delay, it is not possible to lay down any hard and fast rule and every case will have to be decided on its own circumstances

9 In the instant case admittedly, the result of the report of Public Analyst was not sent to the accused at the time or after the institution of the case The complaint was filed in Court on 14-7-1981 and thereafter accused was summoned for 2-9-1981 The report of Public Analyst is dated 24-3-1981 On 2-9-1981, copy of complaint was given to accused and thereafter case was adjourned on the ground that witnesses were not present On 15-10-1981, statement of P W 1 was recorded u/S 244, Cr P C and thereafter on 16-10-1981 charges were framed against the accused After framing of charges, 3 dates were fixed and statement of one witness was also recorded On 17-11-1981, statement of P W 2 was recorded and on the said date, it was alleged that result of report of Public Analyst was sent to the accused by registered post P W 2 admits that he sent the result of the report of the Public Analyst to the accused on 17-11-1981 by registered post His statement was recorded on 17-11-1981 It appears that when he was coming to Court then he sent the result of report to the accused by registered post and thereafter deposited the receipt in Court on the same day The conduct of the P W 2 K P Srivastava, Food Clerk, C M O office is on the face of it improper If result of the report of Public Analyst has not been sent to the accused earlier, then, he should not have sent the same on 17-11-1981 by registered post as he knew that the accused

will be present in Court However in no circumstances it can be said compliance of S 13(2) or rule 9-A The learned Magistrate while considering this question observed that accused did not move any application for sending the sample to the Director of Central Food Laboratory on 17-11-1981 or thereafter In my opinion, the reasoning given by the learned Court below is not correct Firstly on 17-11-1981, registry itself was sent to the accused and secondly, there was no question of moving an application in Court after the statement of both the witnesses had been recorded R 9-A provides that local authority shall after the institution of prosecution send a copy of the report of the result of Public Analyst by registered post or by hand to the person concerned The legislature has provided that the report be sent within 10 days Delay of some days may not vitiate the case but it does not mean that the result of report of Public Analyst be sent to the accused by registered post after recording of the prosecution evidence In my opinion, the present case comes within the first category i e not sending of the result of the report of Public Analyst shall vitiate the trial, it is not the case where result of the report was sent after the time prescribed under the Act As pointed out above, the result of report of Public Analyst was sent on the date when the statement of P W 2 was recorded in the Court As the result of the report of the Public Analyst was sent at a very belated stage and, therefore, in my opinion case of accused deemed to be prejudiced in this case and he is entitled to be acquitted

10 In the result the revision is allowed The conviction and sentence awarded against the applicant is set aside The applicant is on bail He need not surrender and his bail-bonds are discharged

Revision allowed

1991 ALL L J 827

= 1991 Cri L J 2296

H C MITAL AND G D DUBE, JJ

Rehtu Appellant v State Respondent

Criminal Appeal No 348 of 1979 connected with Criminal Appeal No 3648 of 1979, D/- 10-1-1991

Penal Code (45 of 1860), S 300, — Murder — Failure of prosecution to explain contusions on person of deceased — Allegation that active role by grievously injured accused as to surrounding of deceased who was running for his life not possible — Evidence of eye-witnesses as to taking dead body from place of killing to place of throwing dead body — Not believable — Accused acquitted (Para 16)

Shri Bhagwat Prasas Singh and Shri R K Jain, for the Appellant Dy G A for the Respondent

G D DUBE, J — The above two appeals have arisen out of judgment and order of Additional District and Sessions Judge, Saharanpur, holding appellants Rehtu and Biran guilty of the offence u/S 302 I P C and convicting and sentencing each of them to undergo imprisonment for life Since the two appeals arise from same judgment we are deciding them together

2 The prosecution case was that in the Ramlila of Unchagaon some quarrel had taken place between Iqbal and appellant Rehtu Thereafter, the dispute had been settled by the intervention of the residents of Manglur where the deceased resided and that of Unchagaon At about 9-00 to 10-00 a m on 23-3-1978, appellant Rehtu came to the house of reporter Vedpal Singh (P W 1) and started abusing the family members At that time, Pitam (deceased) and Om Vir were also present They asked Rehtu to desist from abusing Meanwhile, Iqbal had also arrived and he gave few slaps to Rehtu Thereupon, Rehtu went away stating that he will take

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DI/GI/A401/91/DSD/VNP

revenge On 1-4-78 Vedpal, his brother Pitam and nephew Kunwarpal were cutting sugar-cane and piling leaves in their Chaks commonly called as "Bheriyon Wala Chak" At about 2 00 p m Rehtu Molhar Biran, Tejpal, Mohkam Ram Singh and Saush came Out of these persons Rehtu and Biran had pistols and the remaining had lathis They started challenging the three persons cutting sugar-cane that they will take revenge and kill each of them They had raised alarm Consequently, Om Prakash Jai Kumar and Kiranpal came Rehtu and Biran took out their Pistols and pointed the barrels towards them Seeing this the three took to their heels for their lives The assailants chased them and surrounding Pitam in the Field of Jaimal of Unchagaon Rehtu and Biran fired their pistols towards Pitam After Pitam fell down, they carried the dead body of Pitam on their lathis and left it in a wheat field in village Rajpur After leaving the dead body the accused went away

3 A written report of the occurrence was lodged by Vedpal Singh at 6-15 p m same day at Police Station Jhabreda district Saharanpur

4 The investigation was taken up by Mahendra Sharma S I (P W 6) He could not take up inquest same day as it had become dark Instead he conducted the inquest proceedings next morning and prepared inquest report He sent the dead body in a sealed cover to B T E Hospital Handwar The post-mortem was conducted by Dr B S Lal (P W 7) at 1-00 p m on 3-4-1978 The doctor had found that the deceased was wearing a dirty Dhoti and Kurta He had found the following ante-mortem injuries —

1 53 Fire-arm wounds over the face and head in right side

47 are wounds of entry and five are abraded and burnt area of skin which are placed posteriorly They are spread in an area of 20 cm before backward and 13 cm side to side Five are each 3 cm x 5 cm almost vertically placed Rest of entry wounds are placed as below (a) 2 are on the right cheek below the eye two are just above the right eyebrow, 11 are on the right temple 20 are on the forehead and 12 on the top of head Thus, totally 47 Each is 5 cm x 5 cm x they are bone deep The margins are contused and black

2 Contusion 15 cm x 8 cm left lumber region towards back

3 Contusion with abrasion left buttock 18 cm x 11 cm

5 Several shots were recovered from the body The stomach contained two pounds of dirty water The small and large intestines were full, but the rectum was empty The urinery bladder was also empty

6 The Investigating Officer had prepared the site-plan of the fields where murder had been committed and the dead body was thrown He had found cut and peeled sugar cane in the field of the deceased He had also found three Daratis, two Harpalis and one Hukka in that very field He had found blood at both the places i e in the field where the murder was committed and dead body was ultimately thrown After other usual investigation, the Investigating Officer had submitted a charge-sheet against the appellants and six others

7 The appellants were charged for the offences u/Ss 148, 302 and 201, I P C The other accused Molhar, Shiv Singh, Rai Singh, Tejpal and Mohkam were charged for the offences u/Ss 147 and 302 read with S 149 and 201, I P C

8 The prosecution examined eight witnesses and filed affidavits of two formal witnesses The accused pleaded not guilty They did not produce any oral evidence in defence They filed only some documents After appraisal of evidence, the lower court held the appellants guilty of the offence u/S 302 IPC The remaining five accused mentioned above were acquitted of all the charges

9 It has been argued on behalf of the appellants that where the case of the prosecution was not believed in respect of some accused then on same evidence it should not

be believed in respect of the appellants also Secondly, it was urged that the prosecution does not explain contusions on the person of the deceased Thus the medical evidence does not support the ocular evidence Lastly, it was contended that the witnesses are not reliable

10 It was pointed out that Rehtu had been examined by a doctor on 23-3-1978 at 3-20 p m The injury report is Ext Kha-1 He had complained pain on the left side of chest A supplementary report about his injury was given by Dr P C Agarwal He had found fracture of lamellar pattern of 9th rib on the left side chest Secondly injury No 3 about complaint of pain on left side chest was opined to be grievous by the Medical Officer This report is Ext Ka-2 It was urged that since Rehtu was injured in a grievous manner only eight days before the occurrence, it was, therefore, not possible for him to have gone to the place of occurrence to take revenge

11 The prosecution story has not been believed in respect of the five accused who have been acquitted It does not transpire that a Government Appeal was filed by the State Government In these circumstances, the case of the prosecution regarding the two accused should be looked with caution and there should be sufficient reason for believing the prosecution case against the appellants The prosecution case could be believed if the prosecution was able to explain the two contusions found on the dead body of the deceased The prosecution does not say that the five accused who have been possessing lathis had wielded their weapons One of the contusions was on the back and the other on the left buttock They were quite big in size The area of second contusion on the back was 15 cm x 8 cm The other contusion on the buttock was 18 cm x 11 cm The prosecution tried to explain these two abrasions by stating that they had been caused while the dead body was being taken on lathis by the accused It was stated that one lathi was placed near the head region and the other towards waist on the buttock region Even if we accept this contention, then the third contusion on the buttock should have extended towards the right buttock also Dr B S Lal (P W 7) had stated in paragraph 11 of the cross-examination that these contusions could be caused only by a strike with a hard object by force In the next line he had obliged the prosecution by stating that if a living person was carried on a lathi, then contusions 2 and 3 could be caused The doctor had forgotten the area of the two contusions By placing a body on a lathi there would be long contusions with the width not more than that of a lathi Any lathi could not be as wide as 11 cm and 8 cm The contusions are caused only when a hard object strikes against the body with sufficient force Simply by placing the body on two lathis, the contusions could not be caused Moreover the body could not be carried on a lathi by placing one lathi at the buttock region and the other on the back In that situation, the back will hang between the two lathis Hence a living person after being placed in the above fashion over two lathis would bend at the back and fall on the ground This will cause some abraded contusions on the waist region The above therefore, goes to show that the explanation put forward by the prosecution witnesses about the contusions is only a product of their imagination and not a true account of their ocular version

12 We agree with the contention of the defence that in the state of injury particularly in the chest region with fracture of tenth rib, Rehtu would have remained lying on his cot On 6-11-1978 the date of his statement u/S 313 Cr P C the accused had stated his age as sixtyfour to sixtyfive years This has not been disputed by the prosecution The learned Sessions Judge has also not observed otherwise holding that the accused was not sixtyfour to sixtyfive years on the date of his statement He had also stated in reply to question No 29 that in the marpit between him and Surendra his bones had fractured It is the prosecution case that some marpit had taken place on 23-3-1978 between Rehtu and the complainant's party The prosecution has come forward with a case that Rahtu and his companion Biram had surrounded the deceased who was running for his life Such an

active role was not possible from a person having grievous injuries on the chest

13 The evidence of the three eye-witnesses was also not reliable Vedpal had stated that the accused had kept the body of Pitam on two lathis and went away He and other witnesses had followed the assailants up to the place where the dead body was thrown In order to make the carrying of the dead body on a lathi probable, the prosecution had introduced in the statement of Jai Kunwar (P W 2) that Dhoti of Pitam was taken out He was made naked The dead body was tied with the lathis by means of that Dhoti Kunwarpal had gone ahead and stated in examination-in-chief that he had tied Dhoti on the dead body of Pitam at the place where it was thrown in the field of village Rajpur We have seen above that the doctor conducting the post-mortem had found a Dhoti tied on the dead body It does not appear probable that anybody will tie Dhoti on the dead body At the best he may cover the body with some cloth or the Dhoti allegedly lying at the spot All these factors go to show that the prosecution has not come forward with clean hands Some improvements have been made during the statements of the witnesses

14 Vedpal (P W 1) had stated that he was following the accused from a distance of hundred yards He had seen that throughout the way blood was dropping on the ground from the body of the deceased It was quite impossible that a man moving at a distance of hundred yards from the assailants would notice the dropping of blood from the dead body Ajai Kunwar (P W 2) stated that while they were following the assailants, they had been raising an alarm He stated that they were keeping a distance from the assailants and were following in such a manner that the assailants could not see The words 'Chhupte Huve" have been used in para 15 of the cross-examination In this way, the intention was to keep their identity not noticed by the assailants In such a circumstance the witness would not have raised any alarm Kunwarpal (P W 3) had stated that when he had tried to save his father, the accused had fired towards him While they were moving along with the accused they used to keep distance and sometime moved erect and sometime in a bent condition so that they may not be seen by the assailants There was no need to move so when they were hundred yards away

15 The prosecution story regarding participation of other accused has not been believed by the lower court We find the manner of taking the dead body from the place of killing to the place of throwing the dead body not believable The story narrated by the three eye-witnesses mentioned above is not believable

16 For the reasons mentioned above, we find that the prosecution story regarding the two appellants was not believable The lower court has wrongly held the appellants guilty of the offence punishable u/S 302, IPC The appellants should have also been held guilty of the charge framed against them

17 In the result both the appeals succeed and are allowed The judgment and order of lower court are set aside The appellants are acquitted of the charge levelled against them They are on bail They need not surrender Their bail bonds are cancelled and sureties discharged

Appeal allowed

1991 ALL L J 830

(SUPREME COURT)

P B SAWANT AND
M FATHIMA BEEVI, JJ

Civil Appeal No 659 of 1978, D/-4-12 1990

Jagmal Singh, Appellant v State of U P and others, Respondent

U P Imposition of Ceiling on Land Holdings Act (1960), S 5(6) — Surplus land — Determination of — Sale of land in question by land-holder — Factum of payment of loan

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LH/GI/S707/90/VNP

and purchase of tractor not disputed — Land was sold for valid necessity and in good faith — Land not sold benami — No interest in land either at present or in future was kept in favour of land-holder — Land in question cannot be considered for determining surplus land in possession of land-holder

Decision of Allahabad High Court, Reversed (Paras 5, 6, 9)

Cases Referred	Chronological	Paras
1981 All LJ 400	AIR 1981 SC 1157	4, 5, 8
1980 All LJ 1105	AIR 1981 SC 636	4, 5, 8

JUDGMENT — In this appeal the short question that arises for consideration is whether the sale of the land effected by the appellant on May 12, 1976 was covered by sub-clause (b) of the proviso to sub-section (6) of Section 5 of the U P Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as the Act)

2 The admitted facts are

An amendment to the Act was introduced with effect from June 8, 1973 lowering the ceiling on holdings under the Act It was given retrospective effect from January 24, 1971 In the meanwhile, the appellant had sold 34 bighas from his holding for a consideration of Rs 73 000/- on May 12, 1972 by a registered sale deed and the possession of the land was also given to the vendee It is only after the amendment of 1973 when a fresh notice was issued to show cause as to why the property sold should not be included in his land-holding, that the dispute with regard to the inclusion or exclusion of the property in the total land-holding of the appellant for the purposes of the Act arose The Prescribed Authority held that the sale deed in question was executed to evade the provisions of the Act and therefore, ignored the sale deed and included the land in the appellant's holding and calculated the surplus land in his possession, accordingly

3 In appeal, the District Judge confirmed the finding and dismissed the appellant's appeal The High Court in writ petition treated the finding of the District Judge as a finding of fact and did not think it necessary to interfere with it It is aggrieved by these orders that the present appeal is filed

4 Mr Goyal, the learned Counsel appearing on behalf of the appellant brought to our notice two decisions of this Court in Brijendra Singh v State of U P , AIR 1981 SC 636 (1980 All LJ 1105) and in Bhupendra Singh v State of U P , AIR 1981 SC 1157 (1981 All LJ 400) which were delivered after the impugned decision of the High Court which is of July 13, 1977 The ratio of these decisions is that once the landholder/tenure-holder proves that he had transferred the land in good faith and for valid necessity and had not done it benami or kept any interest in the transferred land in his favour either in present or in future it is not further incumbent upon him to prove that the transaction was effected for a compelling necessity If the transfer of the land was made in the course of ordinary management of his affairs, it may be held that it is done in good faith and without an intention to evade the provisions of the Act In the present case, the admitted facts are that on the date the land was transferred, there was a loan of Rs 29,000/- and odd outstanding and payable by the appellant to the Government There was also another loan of Rs 5,000/- outstanding and payable by him to a co-operative society It is also not disputed that the appellant who is an agriculturist purchased a tractor for Rs 12,500/- after the said transaction of sale He has, of course, also pleaded that being a patient of tuberculosis, he had to spend a sizeable amount for his treatment which he did out of the monies which he secured by transfer of the land This has also not been disputed on behalf of the authorities It is not disputed that the appellant did pay to the Government the outstanding loan of Rs 29,000/-and odd on May 24, 1972 He also paid a sum of Rs 5,000/- towards the loan of the society and purchased the tractor valued at Rs 12,500/- after the transfer of the land Even if we ignore the amount spent by him on his medical treatment since it is not specified,

in all he spent about Rs 46,500/- after the transaction in dispute The learned District Judge who is the final fact finding authority under the Act without disputing the correctness of these payments has merely observed that since the appellant had transferred two other plots, one in 1964 and another in 1970 for a total consideration of Rs 35,000/-and odd, when the loans to the Government as well as to the society were outstanding, he could as well have paid the loan amounts out of the monies that he had received from the said two sales As far as the purchase of tractor is concerned, he has observed that there was no necessity for selling the old tractor and purchasing a new one It is on these grounds, that he held that there was no need to sell the land in question on May 12, 1972 The High Court has not interfered with his decision, as stated earlier on the ground that it was a finding of fact

5 We are afraid that the learned District Judge has misguided himself As has been observed by this Court in the two decisions (supra), one is entitled to manage one's affairs according to his own best calculations The loans which were taken from the Government and the society were not loans free of interest but carried interest on them The appellant was, therefore, entitled to make his own calculations as to when he would pay them There is further nothing on record to show as to for what precise purpose the two plots were sold by the appellant in 1964 and 1970 There are innumerable reasons why an agriculturist like the appellant is required to dispose of his property from time to time The very fact that although the loans were outstanding at that time, the appellant chose to continue to pay interest on them and raised an additional amount of Rs 25,000/-and odd by selling the two plots shows that it must have been for some valid necessity which arose at that time So is the case with the purchase of the tractor The need felt by the appellant to purchase a new tractor by disposing of the old cannot be a matter of judicial adjudication What the learned District Judge was required to find out was whether in fact the payments in question were required to be made and were accordingly made

6 Since the factum of the payment of loan and purchase of the tractor in particular, has not been disputed, it cannot be said that there was no valid necessity and that the land in question was not sold in good faith There is no dispute further that it was not sold benami and that no interest in the land has been kept either in the present or for the future in favour of the appellant as stated earlier As has been pointed out by this Court, it is not further necessary under the provisions of the said proviso (b) that the landholder, tenure-holder should prove a compelling necessity for the transfer of the land

7 We were trying to find out from Mr Prithvi Raj, learned Counsel appearing for the respondent-State, the sanctity of the cut off date, namely, of January 24, 1971, the transfers after which were to be ignored by the ceiling authorities The query was necessitated to find out whether when the amendment was brought on June 8, 1973 with retrospective effect from that date, namely, January 24, 1971, it can be said that the said transaction which was effected on May 12, 1972 particularly in the circumstances aforesaid could be said to have been effected to evade the provisions of the Ceiling Act There was no material in that respect on record, and for want of it, Mr Prithvi Raj could not assist in that behalf However, he contended firstly that the finding that the land in question was sold to evade the provisions of the Act was a finding of fact Secondly, he emphasised that there was no compelling necessity to effect the sales and he also urged that as pointed out by the learned District Judge the liabilities of the appellant could have been discharged by him in 1964 and 1970 when two plots were sold earlier

8 We have already discussed the latter two aspects of Mr Prithvi Raj's arguments As regards the contention that the finding recorded by the District Judge is a finding of fact, it may be pointed out that since even on the said finding the law is in favour of the appellant, the appellant is entitled to succeed Not to be unfair both to the learned District Judge as well as to the High Court it must be

added that what precise findings had to be recorded in matters such as this was made clear by this Court only after the two decisions of this Court (1980 All LJ 1105 and 1981 All LJ 400) (supra) If the said position of law was before them their decisions might have been different

9 In the circumstances we are of the view that the appellant is entitled to succeed We therefore allow the appeal and set aside the decisions of the courts below In the circumstances we make no order as to costs

Appeal allowed

1991 ALL L J 833

N L GANGULY J

Committee of Management Rashtriya Inter College Raya Distt Mathura and others Petitioners v District Inspector of Schools Mathura and others Respondents

Civil Misc Writ Petn No 13492 of 1991 D/ 4 5 1991

Constitution of India, Art 226 — U P Intermediate Education Act (2 of 1921), S 16A(7) — Dispute between two groups in matters of Management of College — Welfare of students involved — Held, that High Court could solve tangle in exercise of powers under Art 226 instead of remitting matters under S 16A(7) of the Act

There was dispute between two groups in respect of management of institution The scheme of administration of institution was never got modified in terms of provisions of Act as modified by Act of 1981 The welfare of students was involved in the case

Held, that the High Court in exercise of power under Art 226 considered it necessary to solve the tangle going on between the rival groups of persons claiming to be the legal committee of management The petitioners and contesting respondents if are permitted to litigate further for getting declaration from competent Civil Court or Educational Authorities it is not likely that the dispute be decided in near future The interest and welfare of students of the institution needs a legal committee of management at the earliest. In these circumstances it was considered appropriate to direct the Deputy Director of Education to regularise the matter on the lines indicated in the order of High Court

(Paras 6 8 9)

FI/HI/A623/91/MVJ

Smt S V Mishra and V C Mishra for Petitioners R P Goel and Standing Counsel, for Respondents

ORDER — Sri Hoob Lal Sharma as Manager and Sri Mahabir Prasad Dwivedi as President of the Committee of Management, Rashtriya Inter College, Raya District Mathura have filed the present writ petition challenging the order dated 30 3 1991 passed by the District Inspector of Schools Mathura, hereinafter referred to as the D I O S , which is annexure 1 to this petition The D I O S by the said order directed that Sri Satish Chandra shall function as President and Sri Hari Prasad Sharma as Manager of the petitioner Committee of Management.

2 Sri R P Goel, Advocate filed a caveat on behalf of Sri Satish Chandra and Hari Prasad Sharma The petitioner prayed for a writ of certiorari for quashing the order of the D I O S dated 30th March, 1991, and also for a writ of mandamus commanding the respondents not to interfere in the working of the Committee of Management of the institution elected on 31 8 1986 by which the petitioner No 2, Shri Mahabir Prasad Dwivedi and petitioner No 3, Sri Hub Lal Sharma were elected as president and manager respectively, of the said college

3 Admittedly, there had been litigations going on between the parties and a writ petition No 24683 of 1989 Hub Lal Sharma v D I O S , which is pending in which an order of single operation passed by the D I O S was stayed by this Court by an interim order dated 21 5 1990

4 According to the case of the rival parties there are two versions about the validly constituted committee of Manage

ment of the Institution According to the case of the petitioners the last validly elected Committee of Management is of 31 8 1986 in which the petitioner, Mahabir Prasad Dwivedi and Sri Hub Lal Sharma respectively were elected as the President and Manager of the said Committee It is stated that the said Committee elected in 1986 sent papers for recognition before the D I O S but there was no response from the D I O S The petitioners stated that their Committee of Management continued to be in control over the affairs of the Management of Institution In the meantime an order dated 11 10 1989 was passed by the D I O S by which he passed orders for single operation of the accounts of the institution The order of single operation passed by the D I O S was challenged before this Court in writ petition No 24683 of 1989 and as stated earlier an interim order dated 21 5 1990 was passed staying the operation of the order for single operation The petitioners submitted that no election was ever held after 31 8 1986 and Sri Satish Chandra Sharma and Sri Hari Prasad Sharma were never elected as the Manager and President of the Committee of Management of the Institution It was stated that Sri Satish Chandra was not even a member of the general body of the Committee

5 Now there are two dates of election of the Committee of Management as pleaded by the rival claimants One is 31-8 1986 and the other is 31 12 1989 The petitioners have seriously challenged the alleged election of 31 12 1989 in which Sri Satish Chandra and Hari Prasad Sharma were alleged to have been elected. According to the provisions of the Intermediate Education Act 1921 as amended by U P Act No 1 of 1981, standard pro forma for scheme of administration for recognised institution is provided According to the said Act every Committee of Management elected and recognised shall continue for a period of 3 years and within one month after the expiry of the said three years period, new Committee of Management shall have to be constituted again by fresh elections In case the Committee of Management fails to get the elections conducted within the said period, it is provided that an authorised controller be appointed who shall take over immediately after the expiry of the period for which the Committee of Management was elected and get the elections conducted according to law The idea and purpose of getting an authorised controller appointed after the expiry of the period of 3 years for managing the affairs of the Committee of Management of the Institution is to see that the Committee of Management may be vigilant to get elections held within the time schedule provided by the Act No scheme of administration which is inconsistent with the provisions of the amended provisions of the U P Act No 1 of 1981 is valid The allegation of the petitioners that since their scheme of administration provides that in case no election is held within the time prescribed thereof it shall be the duty of the outgoing Committee of Management get the elections conducted In other words, the submission of the counsel for the petitioner is that although their scheme of administration is inconsistent with the amended scheme of administration as contemplated by the amended Act No 1 of 1981 still they should be permitted to get the elections conducted The rival claimants who have been directed to function as manager and President of the Committee of Management were restrained in the civil suit by injunction dated 1 1 1990 specifically, not act upon any resolution as alleged to have been passed in the meeting dated 31 12 1989

6. The D I O S in his order impugned observed that the Committee of Management never got scheme of administration modified and approved after the last elections held in August 1979 The D I O S further stated that the last elected Committee of Management in the year 1979 continued to be in power illegally for such a long time which renders their continuance illegal The Sub-Divisional Magistrate Math District Mathura had also directed to get the elections conducted but the Committee of Management never complied with the orders of the Sub-Divisional Magistrate also It is stated that

only three members of the Committee of Management are alive who also are rendered ineffective on account of no fresh elections for more than a decade The D I O S in his order observed that the non compliance of the orders afore mentioned clearly makes out a case for interference under S 16D(3)(ii) of the Act and pass orders for continuance of Sri Hari Prasad Sharma as Manager and Sri Satish Chandra Dwivedi as the President of the Committee of Management for a period of four months till they get the Committee of Management constituted by fresh elections in accordance with the approved scheme of administration of the institution From the facts stated above it is abudantly clear that the scheme of administration of the institution was never got modified as provided in U P Act No 1 of 1981 It is also admitted that the Committee of Management alleged to have been elected in August 1986 if accepted to have been duly elected in August 1986 is also not entitled to continue after expiry of three years one month There is admittedly an injunction by the Civil Court restraining the respondents from doing any act in purchased of the resolution dated 31 12 1989 Thus, the facts indicate that none of the parties at present are legally competent to be in office of the Committee of Management The D I O S by his order impugned directed that Sri Hari Prasad Sharma and Sri Satish Chandra Dwivedi are permitted to get elections held within a period of four months in accordance with the approved scheme of administration It is nowhere stated that there was any approval to the scheme of administration in accordance with the U P Act No 1 of 1981 On the contrary the petitioners stated that old scheme of administration is still in operation and effective which provides for getting the elections conducted by the earlier Committee of Management After hearing the learned counsel for the petitioners, Sri V C Misra, and learned counsel for the respondents Sri R P Goel who has filed caveat I consider that in view of the facts and circumstances, as narrated above the order of the D I O S cannot be allowed to stand and is liable to be quashed. Sri R P Goel advocate has argued that the institution cannot be allowed to function in absence of any Committee of Management or authority to look after the affairs of the Management of the Institution He is right. The institution and the interest of the students of the institution is the first and foremost factor to be considered There is a fund of Rs 2 lakhs belonging to the institution which is also to be preserved and further necessary direction for smooth running and Management of the Institution be given This Court after setting aside the order of the D I O S could have remitted back the matter before the D I O S to reconsider the matter afresh and in case he arrives at a conclusion that there are rival claims of two Committees of Management then to make reference to the Deputy Director of Education of the region to find out the Committee of Management actually in effective control of the affairs of the management Since the term of the petitioners Committee of Management have admittedly lapsed and respondents Committee of Management have been injuncted by order of Civil Court not to function on basis of resolution dated 1-1 1990 I am convinced that it would not serve any purpose to permit the issue to the D I O S for remitting the matter for decision under S 16A(7) of the U P Intermediate Education Act This Court in exercise of powers under Art 226 of the Constitution considers it necessary to solve the tangle going on between the rival group of persons claiming to be the legal Committee of Management The petitioners and contesting respondents if are permitted to litigate further for getting declaration from competent Civil Court or Educational Authorities it is not likely that the dispute be decided in near future The interest and welfare of students of the institution needs a legal Committee of Management at the earliest In these circumstances, I consider it appropriate to direct the Deputy Director of Education, Region Mathura, to make responsibility to regularise the matter on the lines indicated order below Since the Committee of Management for the institution has to be formed a new out of the members of the general body of the Society of Institution –

Firstly the Deputy Director of Education shall get the scheme of administration of the institution approved in the lines as contemplated the U P Act No 1 of 1981 within a period of 4 weeks from the date of filing of the certified copy of this order The petitioners Nos 2 and 3 and respondents Nos 2 and 3, both, shall submit the scheme of administration before the Deputy Director of Education for getting the scheme of administration of the institution approved in accordance with the Act No 1 of 1981 within 15 days from the date of this judgment, who shall pass final orders about approval of the scheme of administration in the next 15 days

(2) After the scheme of administration is finalised the Deputy Director of Education of the Region shall appoint an officer of the rank of the Associate D I O S 'Additional D I O S of the district to function as authorised controller who shall be directed to publish notice inviting application for membership of the general body of the institution in the local Hindi newspaper within one month from the date of his appointment The requisite amount of membership fee for ordinary members and general body as fixed in the scheme of administration may be accepted by the authorised controller and kept in the account of the institution The list of the existing life members patrol if any may be prepared by the authorised controller shall be final and acceptable by both the parties The authorised controller shall get the election of the Committee of Management conducted within the next 6 weeks from the date of finalising all the lists of members The authorised controller shall get the elections concluded and submit the list of the elected office-bearers of Managing Committee before the D I O S in the time schedule as indicated above who shall pass necessary orders recognizing the Committee of Management and get the charge given to such elected office-bearers from the authorised controller

7 I have indicated the scheduled programme for the installation of legally constituted committee of Management for the institution and the learned counsel for the parties have not expressed any dissent to it The amount of Rs 2 lakhs of the institution shall remain in deposit and either of the parties shall have no right to touch the same The said amount shall be at the disposal of the duly elected Committee of Management as indicated above

8 With these observations the petition is disposed of

9 Let a copy of this judgment may be given to the learned counsel for the parties within seven days on payment of usual charges

Order accordingly

1991 ALL L J 836

= 1991 Cri L J 2546

S R BHARGAVA J

Lakhan Lal Baronia Revisionist v State of U P and another Opposite Parties

*C R No 1361 of 1988 D - 10-5 1991

(A) Criminal P C (1974), Ss 340, 341, 397(2) — Second revision — Competency — Magistrate directing filing of complaint for offence under Section 175, I P C — Order is not one under S 340 as offence under S 175 does not lie in Cl (b) of sub-section (1) of Section 195, Cr P C — Appeal under S 341 — Not competent — Same could only be treated as revision as bar against revision under S 341(2) is not attracted — Second revision — Barred by S 397(2)

(Paras 5, 6)

(B) Constitution of India, Art 20(3) — Protection against testimonial compulsion — Summoning from accused of certain registers containing entries in regard to certain letters

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*Against the Order and Judgment passed by Sri L N Rai S J , Lalitpur, D - 23-8-1988

FI/HI/A781/91/SNV

— Letters if entered in registers would corroborate defence case — Entries if not there would be destructive of defence case — Entries or omissions thereof, within knowledge of accused — Summoning of registers could not be ordered (Para 13)

Cases Referred	Chronological	Paras
1980 Cri LJ 196	AIR 1980 SC 185	8 11
AIR 1965 SC 654	(1965) 1 SCWR 375	10
1965 (2) Cri LJ 256	AIR 1965 SC 1251	11
1964 (2) Cri LJ 199	AIR 1964 Punj 325	9
1961 (2) Cri LJ 856	AIR 1961 SC 1808	11
1956 Cri LJ 248 (1)	AIR 1956 Madras 165	8

Mr G S Hajela, for Applicant Mr S K Kulshrestha, for Opposite Parties

ORDER — This Revision has arisen in curious circumstances

2 Revisionist Lakhan Lal Baronia is Principal of a college at Lalitpur Opposite Party No 2 Krishna Nandan Prasad Sinha is a teacher in the same college University of Bundelkhand appointed opposite party No 2 Krishna Nandan Prasad as examiner and sent some answer books of B A in the year 1984 to him It sent the railway receipt under separate Registered Post For the purposes of this case it is not disputed that revisionist took delivery of the Registered envelope and answer books He examined the answer books and realised remuneration from the University Opposite Party No 2 Krishna Nandan Prasad filed criminal complaint against the revisionist and a clerk of Post Office for offences under Sections 379, 403, 420 427 and 461 read with Section 109 I P C Revisionist was summoned His plea was that during relevant period opposite party No 2 was not available at Lalitpur as he had gone to Patna in connection with the death of his mother He sent letter to the University intimating the above fact and then the University directed him to the delivery of registered envelope and the answer books and examine the answer books Hence he took delivery, examined the answer books and realised his remuneration Krishna Nandan Prasad moved an application for summoning Despatch Register and Register of Letters received from the revisionist Obviously the purpose was to belie the defence case It is not disputed that revisionist did not produce the register before the Magistrate Then opp party No 2 Krishna Nandan Prasad moved application u/S 340 Cr P C for filing Criminal complaint by the Magistrate against the revisionist for offence u/S 175, I P C

3 Despite objections by the revisionist learned Magistrate allowed application under S 340 Cr P C and directed filing of complaint against the revisionist for offence u/S 175 I P C

4 Against this revisionist went up in appeal before the Sessions Judge u/S 341, Cr P C The learned Sessions Judge was of the view that the revisionist was required to produce register as Principal of the college and not in personal capacity He had accepted the cost He was bound to get the register produced before the court The learned lower appellate court dismissed the appeal Against this the present revision has been filed

5 On behalf of the opposite parties it was contended that in view of S 341(2) revision is not maintainable This sub-section lays down that an order u/S 340 subject to any order passed u/S 341 should be final and should not be subjected to revision On behalf of the revisionist it was contended that the proceedings before the Magistrate u/S 340 and in appeal before the Sessions Judge u/S 341 were incompetent S 340 lays down enquiry only in respect of any offence referred to in clause (b) of sub-sec (1) of S 195 Cr P C offence u/S 175, Cr P C lies in cl (a)(i) of sub-sec (1) of S 195 and not in cl (b) of sub-sec (1) of S 195 This position of the law is quite correct Hence for the sake of satisfaction Magistrate could have made any enquiry and filed complaint But that order could not be u/S 340, Cr P C Hence appeal u/S 341 Cr P C was not at all competent The Sessions Judge could have treated the appeal only as revision and so the bar against revision contemplated in S 341(2) Cr P C cannot be attracted I am in agreement with the contention advanced on behalf of the revisionist

6 Then the question arises if the order of the Sessions Judge is deemed to have been passed in a Revision whether a second revision would be barred by S 397(3) I am of the opinion that second revision would certainly be barred

7 It was vehemently urged on behalf of the revisionist that this Court may invoke its inherent power u/S 482 Cr P C and quash the orders of the Sessions Judge and the Magistrate for filing complaint because the matter goes to the root of the maintainability of the complaint It was contended on behalf of the revisionist that for offence u/S 175, Cr P C the person required to produce document must be legally bound to produce or deliver up the documents before the court of public servant It was then contended on behalf of the revisionist that he himself was accused in the complaint case U/Art 20(3) of the Constitution he could not be compelled to be a witness against himself and produce or deliver up the registers before the Magistrate He was legally not bound to produce or deliver the register Hence non-production of the register would not be an offence u/S 175 Fact that revisionist accepted the cost of Rs 30/- is irrelevant Acceptance of cost would not operate as estoppel against constitutional provision

8 Article 20(3) of the Constitution is a protection to the accused against compulsory testimonial It incorporates the theory 'Nemo tenetur se ipsum accusare' No Man is bound to accuse himself It confers immunity from compelling an accused person to be a witness against himself by giving self-incriminating evidence At one time it was considered that this theory extends only to oral testimony But gradually it has been extented to documentary evidence In M P Sharma's case, a Division Bench of the Madras High Court in Swarnalingam Chettiar v Assistant Labour Inspector Karaikudi, AIR 1956 Madras 165 (1956 Cri LJ 248 (1)) held that a summons could not be issued u/S 94 of the old Code to the accused for production of certain documents in his possession irrespective of the fact whether those documents contain some statement of the accused made of his personal knowledge and accordingly the summons issued to the accused to produce certain documents was quashed Supreme Court commented upon this case in the case of V S Kuttan Pillai v Ramakrishanan, AIR 1980 SC 185 (1980 Cri LJ 196) Their Lordships said (at page 189 of AIR)

What was kept open in Sharma's case whether a person accused of an offence could be served with a summons to produce documents was decided when it was observed that immunity from self incrimination would not comprehend the mechanical process of producing documents in court which may throw a light on any of the points in controversy but which do not contain a statement of the accused based on his personal knowledge '

9 In the case of State v Prabhu Singh 1964 (2) Cr LJ 199 the question was whether the order requiring the production of a document by an accused person is hit by the prohibition contained in Art 20(3) The answer to this question was if the document is such as is not his statement conveying his personal knowledge relating to the charge against him , he may be called upon by the Court to produce that document But if the order relates to a document which contains any statement of the accused based on his personal knowledge, the order for the production will attract the constitutional bar against testimonial compulsion

10 Case of Official Liquidator, the Popular Bank Limited v I K Madhava Naik, AIR 1965 SC 654 does not help in the present case In this case it was held that an order u/S 45G of the Banking Companies Act for public examination of any person of a Banking Company is not void as violating Art 20(3) of the Constitution of India because there is no accusation in a proceeding u/S 45G resulting in an order for public examination

11 In the case of State of Gujarat v Shyamlal Mohan Lal Choksi, AIR 1965 SC 1251 (1965) (2) Cri LJ 256) it was held that one of the fundamental canons of the British system of the Criminal Jurisprudence and the

American Jurisprudence has been that the accused should not be compelled to incriminate himself The Indian legislature was aware of the above fundamental canon of criminal jurisprudence because in various sections of the Criminal Procedure Code it gives effect to it Then their Lordships referred to the case of Kalu Oghad, AIR 1961 Supreme Court 1808 and said that an accused person cannot be compelled to disclose documents which are incriminatory and based on his knowledge Both in this case and the case of V S Kuttan Pillai v Ramakrishanan (supra) general search and seizure were held to be not violating Art 20(3)

12 Now reverting back to the facts of the case it would be useful to reproduce the contents of the application moved on behalf of opposite party No 2 for summoning registers from the revisionist —

"The undersigned complainant begs to pray to this Hon'ble Court to kindly direct the accused Lakhan Lal Baronia who is Principal of Nehru Degree College, Lalitpur to produce the following documents which are relevant in due discharge of justice in the personal case

'The following documents are in possession of the accused as a principal

(1) The Despatch Register in which the despatch of the letter dated 25-4-1984 allegedly written by the accused to the Registrar, Bundelkhand University Jhansi is recorded

(2) The Register in which the receipt of the letter dated 7-5-1984 allegedly written by the Registrar, Bundelkhand University, Jhansi to the accused is recorded

13 It it thus admitted by opposite party No 2 that the Registers were in possession of the revisionist who was an accused in the case Whether he was in possession as principal or not would not make any difference to the protection of Art 20(3) of the Constitution Reverting back to the defence propounded by the revisionist it would be worthwhile to mention that if the entries of the letter sent and letter received were in the Registers they were in the knowledge of the revisionist Their omission would have been equally in the knowledge of the revisionist If the letters were entered in the Register they corroborated the defence case but if the entries were not there they would be destructive of the defence case When the entries or omissions were in the knowledge of the revisionist as accused and production could bring in his statement against his defence, it has to be said that the revisionist was required to produce documents which in his knowledge contained his incriminating statement or statement destructive of his defence I hold that in the circumstances of the case the Registers could not have been summoned from the revisionist and the summoning order was repugnant to Art 20(3) It is thus evident that the revisionist could not be legally compelled to produce Register and his failure to produce the Register did not constitute offence u/S 175, I P C

14 In result, I hold that it is abundantly clear that no offence u/S 175, IPC was made out against the revisionist Hence the orders of the Magistrate and the Sessions Judge for filing complaint for offence u S 175 I P C are illegal and void and any complaint filed in pursuance thereof would simply amount to unnecessary harassment and abuse of process of law

15 Hence, in result, treating this revision as application u S 482, Cr P C I quash the orders of the Magistrate and the Sessions Judge and any complaint filed in pursuance thereof

Application allowed

1991 ALL L J 840

= 1991 Cri L J 2516

PALOK BASU AND
U K VERMA JJ

Kalika Prasad Appellant v State, Respondent

Criminal Appeal No 1207 of 1983 D/-9-4-1991

Penal Code (45 of 1860), S 300 — Murder — Circumstantial evidence — Evidence of neighbours of accused about incidence found reliable — Theory of suicide not found possible — Accused proved to have evil eye on deceased girl who was his wife's niece — Conviction upheld

1981 Cri LJ 325, Disting (Paras 20, 21)

Cases Referred	**Chronological Paras**
1981 Cri LJ 325 AIR 1981 SC 765 (disting)	18

Vishnu Gupta, Rakesh Kumar Varma, P N Tripathi, for Appellant D G A, for Respondent

JUDGMENT — Kalika Prasad has filed this appeal against his conviction u/S 302 IPC and sentence of Life Imprisonment as passed by the II Addl Sessions Judge Nainital on 3-1-1983 in Sessions Trial No 196 of 1981 The charge against the appellant was that sometimes in the morning of 24th March 1981 at the Jhuggi of A Charge Area of Kashipur Civil Exchange 78 R P S & E, Hempur, P S Kashipur, district Nainital, he committed murder by intentionally causing death of Km Savitri Devi by causing an axe injury on her head and thereby committed an offence punishable u/S 302, IPC

2 The present case is dependent upon circumstantial evidence, therefore it has to be seen whether all the circumstances sought to be proved have been actually proved or not and then cumulatively those circumstances point out the only hypothesis of the appellant committing the murder or not.

3 Km Savitri was the daughter of appellant's wife's sister She has been coming to the house of her aunt (Mausi) In the Holi the appellant sent his family to his house in village and called Km Savitri to his cottage in Hempur on the pretext that his wife was ill P W 3 Sumar Singh went to the house of the appellant on 23-3-1981 at about 8 a m to borrow his cycle and found the door of the house bolted from inside and the accused was absent On equiries the residents in the neighbourhood peeped into the house from back door and saw Km Savitri lying dead and an axe was struck up in her head Sumar Singh informed his Commanding Officer who sent a FIR which was entered in the General Diary report No 21 at 9-30 a m P W 8 A S Sharma, S I went to the place of occurrence and prepared a Panchayatnama whereafter the dead body was sent for post mortem examination P W 2 Dr D J Joshi conducted the post mortem examination on 25 3 1981 at 11-30 a m and found the following injuries —

1 Incised wound 11 cm x 4 cm x brain deep over perital and occipital region anterio-posterior in direction Brain matter coming out of the wound

2 Incised wound 10 cm x 1 cm x bone deep over mid line head anterio-posterior in direction, 3 cm medial to injury No 1

3 Incised wound 5 cm x 1 cm x 0 2 cm over neck back side at base transverse in direction

4 Linear abrasion 13 cm x 0 5 cm over back of the scapular region right side oblique in direction Scab formed '

4 According to the opinion of the doctor the deceased was aged 16 years and the death had taken place about 1 1/2 days before There was no injury on the private parts and that the injuries were sufficient in the ordinary course of nature to cause death

5 The Investigating Officer had, however, taken out the axe, shawl a pair of Tori and pieces of bangles as also blood stained and plain earth and prepared various memo

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randa Exts Ka 2 to Ka-5 He drew a site plan also On his return he converted the case u S 302 IPC vide general diary No 45 The formal investigation was taken up by S P Sharma who had submitted a charge sheet against the appellant

6 The appellant denied the charge and pleaded not guilty He stated that he had gone to his house at the relevant time He was not present in Hempur He further contended that witness Sumer Singh had brought Km Savitri three or four months back and she was living with him When he went on leave he had asked Sumar Singh to look after his residential quarter He said that P W 7 Deo Karan was his tenant at Rs 10/- per month He did not produce any evidence in defence

7 In order to prove the prosecution case the following witnesses were examined P W 1 Kishan Ram, who filed an affidavit regarding carrying of dead body for post mortem examination P W 2 Dr D J Joshi conducted the post mortem examination, P W 6 Kanthu Ram an attesting witness of memoranda and P W 8 A S Sharma, S I is the Investigating Officer

8 P W 3 Sumer Singh, P W 4 Smt Chaturo Devi P W 5 Birmo Devi and P W 7 Deo Karan are witnesses of fact who have deposed about the incidents and instances trying to connect the appellant with the crime The learned Trial Judge has accepted their evidence and consequently held that the circumstances which have been proved through their testimony established the fact of murder of Km Savitri by the appellant beyond reasonable doubt Sri P N Tripathi learned counsel for the appellant has argued at great length and has placed the entire record Sri Jagdish Tewari learned counsel for the State has supported the version of the prosecution

9 It may be relevant to mention here that learned trial Judge had taken note of the following circumstances emerging from the statements of witnesses produced by the prosecution as proving the guilt of the appellant Those were (i) Motive, (ii) Deceased having been threatened by the accused, (iii) recovery of the deadbody of the deceased from the house of the accused and (iv) Absconding of accused immediately after the incident But this is not all In fact from the evidence produced by the prosecution three more circumstances appear Firstly, the deceased had left the house of the appellant in the preceding night and had gone to the house of P W 4 Smt Chaturo Devi wherefrom the appellant brought her back in the morning of the unfortunate day Secondly the appellant was seen with the deceased and had been heard saying to her "Savitri Agar Tune Meri Bat Nahin Mani to Main Tujhe Kulhari Se Mar Doonga Kisi Ko Pata Nahin Chalega" Thirdly, the axe which was found stuck up in the head of Km Savitri belonged to the appellant Needless to say if these three additional circumstances are also proved from the record there would be no escape from the conclusion that it is the appellant alone who has committed the murder of Km Savitri

10 Crime knows no law and the criminal mind perpetrates crime thinking that his conduct is going unnoticed but in the process leaves his imprint at every nook and corner of the steps taken from which the complicity of the criminal becomes apparent

11 The deposition of P W 3 Surnam Singh indicates beyond doubt that Km Savitri had come on earlier occasion to live with the appellant s family when his wife was in family way During Holi the appellant shifted his family to his village home and brought Km Savitri to his house on the false pretext of illness of his wife It is said that the appellant had an evil eye upon his niece P W 5 Smt Birmo Devi has stated that Km Savitri had gone to her house on the preceding night at 10 p m complaining that the appellant wanted to molest her chastity and she was not prepared to sleep in the house with him Consequently Smt Birmo Devi took her to P W 4 Smt Chaturo Devi and the statement of P W 4 Smt Chaturo Devi is that Km Savitri slept in her house in the preceding night She has further said that at about 5 a m the appellant had come to her house and took back Km Savitri This part of

the prosecution case is corroborated by the statement of P W 7 Deo Karan who is son of P W 4 Smt Chaturo Devi In his statement P W 7 Deo Karan has further stated that he was going to his incident He passed through the house of the appellant and had heard him scolding Km Savitri that he would kill her if she did not carry out his wishes Deo Karan has further said that when he had returned from his maternal uncle's house around 8-30 a m there was a crowd at the house of the appellant but the appellant was not present

12 P W 3 Sumer Singh has clearly stated that when he had come to the house of the appellant for borrowing his cycle he did not find the appellant and on asking the immediate neighbours as to why the door was bolted from inside they all peeped from the back door and found Km Savitri struck with the axe of the appellant Sumer Singh then immediately went to his Commanding Officer who conveyed the FIR about the incident to the local police saying as follows --

'It has been intimated that one girl has been found dead in the Jhuggi of 'A' Charge Area of this Unit and some foul play in suspected You are requested to take immediate action '

P W 8 A S Sharma, Sub Inspector, was present in the Police station at about 9-30 a m when the FIR was lodged He rushed to the place of occurrence, prepared the inquest report and also prepared various memoranda relating to the recovery of blood-stained axe, blood-shawl, Tori, a wearing apparel below ankle, broken pieces of bangles and blood stained and plain plaster pieces of the room and also prepared a site plan All this was done inside the house of the appellant He searched the appellant who was not traceable He took the process u/S 82/83, Cr P C for securing the presence of the appellant but all attempts had failed in spite of attachment

13 There is not a single suggestion from the side of the appellant as to what is wrong with the testimony of P W 3 Sumer Singh, P W 4 Smt Chaturo Devi and P W 5 Smt Birmo Devi and P W 7 Deo Karan They are living in the nearby residential quarters and are well known to the appellant They had no reason of deposing falsely There was enmity persisting In spite of long cross-examination, nothing has been brought out to discredit their testimony

14 Learned counsel for the appellant made three specific arguments They will be taken up one by one

15 It is argued that injury was self-inflicted and it may be a case of suicide P W 2 Dr D J Joshi has emphatically answered that this injury could not be a self-inflicted The force with which the axe was hit in the skull of Km Savitri was so tremendous that it remained stuck up in the hole which its blade had created therein Consequently the theory of suicide is impossible

16 The next argument is that Sumer Singh has stated that front door was broken open to enable him and other persons to get into the house If that is so how could the appellant go away This argument too is fallacious Smt Birmo Devi has said that one of the back doors was apparently closed but was not locked or bolted from inside It was only shut Consequently the person inside the house could easily go out after committing assault through the back door Moreover the breaking open was not a major engineering work but in such type of quarters a good push or forceful knock may have opened the door Consequently this argument is rejected

17 The last argument was that Deo Karan and Sumer Singh may have been responsible for committing the murder as the appellant has said that he had asked Sumer Singh to look after the family as he had left his house from before the incident and that Deo Karan was one of his (appellant) tenants This is a cry in the wilderness or drowning man catching a straw to save himself There is not an iota of evidence brought on the record to suggest that the appellant was on leave or had left his quarter earlier to the incident Sumer Singh himself is the person who had passed the information to his Commanding Officer His statement is fully supported by three other witnesses Smt Chaturo Devi, Smt

Birmo Devi and Deo Karan Therefore this argument based on the suggestion to the witnesses and on the statement of the appellant u/S 313 Cr P C is as baseless as the aforesaid two

18 —In this connection learned counsel for the appellant relied upon the case of Shankerlal Gyarasi Lal Dixit v State of Maharashtra, AIR 1981 SC 765 (1981 Cri LJ 325) One of the circumstances relied upon by the trial Judge and the High Court in that case was that the appellant was found inside the house sleeping in his room when the deceased was found murdered in the bath-room The Supreme Court has held that the finding of both the courts on the said circumstance was erroneous ignoring relevant factors, and therefore came to the conclusion that the said circumstance was not proved against the appellant therein In view of the major circumstance falling, the Supreme Court had allowed the appeal of Shanker Lal in the cited case Therefore the said case has no application to the facts of the present case and is distinguishable

19 From the aforesaid circumstances it is proved beyond doubt that the appellant had motive to commit the crime He may have developed an infatuation for her In a planned manner he shifted his family to his village home and then brought the deceased to his house This necessarily indicates an evil eye of the appellant on the blooming youth of Km Savitri But if and when Savitri objected or did not yield or resisted, the appellant in sheer frustration has put an end to her life The going away in the night and living with the neighbours may itself have been enough disliking factor for the appellant as it was likely to undermine the appellant's character in estimation of his neighbours at least

20 Therefore, there is not a moment's hesitation in holding that the appellant is the only person who had committed the murder of Km Savitri as each and every circumstance has been proved beyond doubt and they are consistent only with the guilt of the appellant

21 In view of the aforesaid discussion the conviction of the appellant u S 302, IPC and the sentence of imprisonment for life is upheld The appeal lacks force and is hereby dismissed The appellant is in jail and will serve out the sentence awarded

Appeal dismissed

1991 ALL L J 843

= 1991 Cri L J 2462

PALOK BASU AND P P GUPTA, JJ

Ram Raj Singh and others, Appellants v State of U P Respondent

Criminal Appeal No 37 of 1979, D/-6-3-1991 *

Penal Code (1860), S 300 — Murder — Medical evidence not corroborating ocular evidence — Eye witnesses unworthy of credence — Recovery of dead body in flowing river bed from same place where it was alleged to have been buried — Not reliable — Story of assault set up by prosecution witnesses was suspicious — Accused would be entitled to benefit of doubt

Evidence Act (1872), S 3

(Paras 12, 15, 23)

R D Upadhyay, Y D Dwivedi and D S Tewari for Appellants, Dy Govt Advocate, for Respondent

P P GUPTA, J — This is an appeal filed by the accused Ram Raj Singh, Zaki-ullah, Rahmat Vijai Bahadur Uma (since dead), Shyam Narain, Shyam Ji and Ram Dhani against the judgment and order dated 23-12-1982 convicting them u/S 302, IPC and sentencing each of them to undergo life imprisonment passed by the Sessions Judge, Gorakhpur

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*Against judgment and order of V N Gupta, 6th Addl Dist Judge, Gorakhpur, D/-23-12-1978

2 The appellants were charged u/S 302, IPC for having committed the murder of Brahma Singh on the night of 26-27-6-1976 at about 12 00 in villages Saraiya P S Belipur district Gorakhpur

3 After hearing the learned counsel for the appellants and the learned Additional Government Advocate for the State and perusing the record of the case on 6-3-1991, the appeal was allowed We now proceed to give the reasons therefor

4 The prosecution case is that accused Ram Raj Singh who is the real brother of the deceased Brahma Singh was employed in the Military and was away from his home for quite sometime During his absence, the deceased Brahma Singh is said to have developed illicit relations with his wife After Ram Raj Singh returned home on retirement, Brahma Singh got married Their relations became strained About one year prior to this occurrence Brahma Singh was assaulted by Ram Raj Singh, Ram Dhani and Vijai Bahadur A case was registered against them and Ram Raj Singh was arrested He was released on bail about one month and ten days prior to this occurrence After his release on bail, Ram Raj Singh became a deadly enemy of Brahma Singh

5 Further case of the prosecution is that Brahma Singh, apprehending danger from Ram Raj Singh, allegedly collected a Panchayat in his village on the night of occurrence in the open space in front of the 'baithak' of Sangram Singh alias Samgam Singh, who was ex Pradhan of Gaon Sabha In the Panchayat, besides Sangram Singh, Ram Awadh Singh, Pradhan and other persons of the village and some residents of other villages also were present The deceased and the accused persons were also there Smt Rumali Devi, wife of Brahma Singh, was also watching the proceedings of the Panchayat In the course of the proceedings of Panchayat, hot words and abuses were exchanged between the accused Ram Raj Singh and the deceased Brahma Singh Allegedly, Ram Raj Singh became violent and instigated the other accused to do away with Brahma Singh On this instigation Brahma Singh was attacked by the accused Shyam Singh, Zakirullah, Rahmat, Vijai Bahadur, Ram Ji Singh, Shyam Ji with lathis Meanwhile the accused Uma and Ram Dhani brought a shot gun and a pistol respectively with which they fired on Brahma Singh, who died Thereupon Ram Raj allegedly said that it was not proper to leave the dead body there and suggested that the same should be disposed of Acting on his suggestion the accused Vijai Bahadur brought a Charpai from the Osari of Sangam Singh alias Sangram Singh The dead body of Brahma Singh was put on the Charpai and was taken away towards north Nobody dared to go to the Police Station in the night for lodging the report A F I R was lodged by Smt Rumali, the wife of the deceased, on the next day, in the morning at 6-30 a m , at P S Belipar

6 S I Ayodhya Nath Misra was present at the Police Station and was acting as in charge He took up the investigation of the case and interrogated Smt Rumali Devi and Vindhya Chal at the Police Station itself Thereafter he proceeded to the place of occurrence and after interrogating the witnesses present, completed all other formalities He collected blood from the place of occurrence He then proceeded towards the Chak-Road following the track of blood drops on the way Proceeding still further he reached the field of Dhanraj where also he found a pool of blood Again the blood-stained and plain earth was collected from there by him The track of blood drops further took him to river Rapti by the side of village Barajuwa Some blood was found by the side of the river also which was collected by him

7 A net had been spread in the river bed by S I Raj Nath Gautam before S I Ayodhya Nath Misra reached there S I Gautam was sent there in advance in search of dead body Blood-stained 'Baanh' of Charpai was recovered from the river bed with the help of the net It was collected and sealed He also found a portion of the ground washed with water on the river side near the place where some blood was found

8 The prosecution case further is that on 28-6 1976 the accused Zaki-ullah was arrested by S L Laik Ahmad of P S Rajghat and Shiv Adhar P W 6 the S O of P S Rajghat interrogated Zaki-ullah at the Police Station from whom he learnt that the accused was involved in the murder of Brahma Singh He sent its information to P S Belipar through Police Constable, Om Prakash who met S I Ayodhya Nath Misra at Namsharh chauraha He conveyed the information to him On this information S I Ayodhya Nath Misra went to P S Rajghat and interrogated the accused Zaki-ullah, who gave information that the arm and head of dead body of Brahma Singh had been buried in the bed of Rapti River in knee deep water and his body had also been left in the river bed and that he could get the same recovered Accused Zaki-ullah led the police party and the witnesses to river Rapti near village Domingarh He entered inside river bed, removed sand from the bed at one place and took out the buried head and arm as well as the body which was then packed in a gunny bag by S I Avodhya Nath Misra After completing the other necessary formalities, the sealed dead body and parts thereof recovered from the bed of river Rapti were sent for post-mortem The entire body of Brahma Singh was sent for post-mortem examination which was conducted on 29-6-1976 at 4-30 p m at Gorakhpur by P W 3 Dr M N Gope Superintendent, District Hospital Gorakhpur who found 8 incised wounds, 4 lacerated wounds, 7 punctured wounds and one lacerated gun shot wound It is said that the body was identified by deceased's relatives and other witnesses After completing the investigation, charge-sheet was submitted again

9 The accused did not plead guilty and attributed this false implication due to enmity

10 Sri D S Tewari has been heard for the appellants, while Sri A K Dwivedi has argued the matter on behalf of the State The entire record has been examined

11 In order to prove the prosecution case, the informant Smt Rumali Devi, wife of deceased Brahma Singh was examined as P W 1 P W 2 Vindhyachal is the real brother of the deceased, who was also an eye-witness to the occurrence P W 5 Sangram Singh is another eye witness The other witness P W 7 Palakdhari Singh and P W 8 Khusar Singh are witnesses of recovery of the dead body Besides examining Dr M N Gope, who performed an autopsy on the dead body of Brahma Singh, and the Investigating Officer Ayodhya Nath Misra P W 16, the other witnesses are formal in nature

12 The main thrust of the arguments of the learned counsel for the appellants was that there was a conflict between the ocular and medical evidence for which the oral testimony is unworthy of credence The medical evidence does not corroborate eye-witnesses, account as given by the prosecution witnesses thereby casting a grave doubt on the authenticity of the prosecution case Dr M N Gope P W 3 who performed autopsy on the dead body of Brahma Singh found 9 incised wounds, 4 lacerated wounds, 7 punctured wounds and one fire arm injury on the dead body He proved the post-mortem report which was exhibited as Ex Ka-2 If we go through the eye-witnesses account as given by P W 1 Smt Rumali Devi, wife of deceased, P W 2 Vindhyachal the real brother of the deceased, and P W 5 Sangram Singh, Ex-Pradhan of the village Saraiya we find that all of them were specific that the assault was committed by lathies and fire-arms There is no mention of use of any sharp edged weapon It is also not there that Brahma Singh was assaulted with a sharp edged weapon by accused or by any of the persons accompanying them Dr M N Gope P W 3, has stated on oath and has also mentioned in the post-mortem examination report that all the injuries including the punctured wounds were ante-mortem injuries The evidence of the medical expert therefore, does not tally with the eye-witnesses account It is, therefore, obvious that there is a great conflict between the evidence of eye-witnesses and the medical evidence The medical evidence does not corroborate the ocular evidence which creates

a grave doubt on the credibility of the eye-witnesses

13 An attempt appears to have been made by the prosecution to show that the punctured wounds might have been post-mortem injuries inflicted within five minutes of the death of Brahma Singh The Doctor, who performed the autopsy, has opined that if the injuries are inflicted within five minutes of the death of a person, even the post-mortem injuries will give an appearance like ante-mortem injuries It was, therefore, submitted that notwithstanding the description of punctured wounds having been given by the Doctor in his post-mortem examination report, the punctured wound may be post-mortem injuries inflicted within minutes after the death of Brahma Singh It is, therefore, to be assessed whether there is convincing evidence to the effect that punctured and incised wounds might have been inflicted within five minutes of the death of Brahma Singh

14 In the FIR lodged by Smt Rumali Devi, it has been stated that Ram Dhani and Uma, after firing at her husband said that he was dead It was thereafter that the suggestion came from Ram Raj Singh not to leave the dead body there On his suggestion, a cot was brought from the Osara of Sangam by Vijay Bahadur Singh After putting the dead body on the cot, all the accused proceeded towards north In her statement on oath also, she has reiterated this fact She has, however, tried to improve in her statement by saying that after being hit by the fire arms, her husband was breathing slightly and so Ram Raj Singh pressed him with his Lathi until he was dead It was thereafter that the dead body of Brahma Singh was taken on a cot brought by Vijai Bahadur from the Osara of Sangam after pushing one Parasuram from the cot Parasuram has not been examined as a witness in this case The body of Brahma Singh was then taken on the cot towards the north It is not clear from the evidence as to at what place the punctured wounds were caused However, if we take all these events into consideration, it becomes clear that cot was brought from the Osara of Sangam after making it certain that Brahma Singh was dead It was thereafter that his dead body was put on the cot and taken towards north The punctured wounds on the dead body were not caused in the visibility of eye-witnesses, otherwise the witnesses would have certainly deposed to have seen the accused inflicting punctured wounds on the dead body Therefore we are not satisfied that the punctured wounds were inflicted within five minutes of the death of Brahma Singh Thus the prosecution has failed in establishing that because the punctured wounds were caused within five minutes of the death of Brahma Singh, they looked like ante-mortem injuries in the appearance thereby giving an occasion to the Doctor to mention these punctured wounds also as ante-mortem injuries

15 It is also important to note at this stage that whereas P W 1 Smt Rumali Devi and P W 2 Vindhyachal who are close relatives of the deceased have stated that Brahma Singh was assaulted with lathi by all the accused excepting Uma and Ram Dhani, while P W 5 Sangram Singh has categorically denied the participation of the accused Rahmat Ali and Shyamji Thus, we find that there is no satisfactory explanation of the punctured wounds found on the body of deceased Brahma Singh Also the participation of at least two of the accused, Rahmat Ali and Shyamji, becomes doubtful in view of the categorical denial by P W 5 Sangam Singh Thus, the medical evidence does not corroborate the ocular evidence Therefore, the eye-witnesses are unworthy of credence and no implicit reliance can be placed on their testimony

16 The recovery of dead body, at the pointing out of the accused Zaki-ullah, is also doubtful in this case It has come in the evidence of P W 6 Shiv Adhar Rai, who was posted as S O , P S Rajghat, that Zaki-ullah was arrested by S I Laik Ahmad on 28-6-1976 During interrogation at the police station by him, he came to know his involvement in the murder of Brahma Singh Information of it was sent to P S Belipar from where S I Ayodhya Nath Misra arrived at

P S Rajghat and interrogated Zaki-ullah, who volunteered to give information regarding the dead body of Brahma Singh, which he and the other accused had concealed in the bed of river Rapti He was taken there from where he dug out the dead body from the water of river Rapti

17 We are, however in the dark as in what connection the accused Zaki-ullah was arrested by S I Laik Ahmad No attempt has been made either to examine the S I Laik Ahmad or to file relevant entry in the General Diary regarding his arrest Further the information regarding the arrest of Zaki-ullah from P S Rajghat was sent to P S Belipar through the constable, Om Prakash, who met the S I , Ayodhya Nath Misra, at the crossing of Nausar Chauraha Even constable Om Prakash of P S Rajghat has not been examined In the circumstances, the arrest of Zaki-ullah accused becomes highly doubtful The recovery witness P W 7 Palakdhari could not say whether the accused Zakiullah, present in court, was the same person, who had dug out the dead body from the river bed of Rapti P W 8 Khusar, who is another witness of recovery, is resident of another village Garhawa, which is about 4 to 5 miles on the south of Nausar Chauraha It was on his own that he accompanied the police party and reached the river Rapti He did not know the accused Zaki-ullah from before When the dead body was recovered, the persons present told him that the man, who recovered the dead body was Zaki-ullah It is nowhere mentioned in his statement that he identified Zaki-ullah in the court as the person who had dug out the dead body in his presence It is also important to note that if a large number of persons belonging to the village Saraiya were present there at the time the dead body was dug out by the accused Zaki-ullah, why none of them was made an eye-witness to the recovery and why P W 7 Palakdhari Singh, resident of Badhagarha, and P W 8 Khusar of village Garhwa were selected to be the witnesses of recovery In the circumstances, the recovery of dead body of Brahma Singh at the pointing of the co-accused Zaki-ullah becomes highly doubtful

18 Holding of Panchayat in this case is also very doubtful There was no occasion for holding the Panchayat by Brahma Singh Simply because he apprehended danger from the hands of accused Ram Raj Singh it cannot be believed that there was an occasion to hold Panchayat There was no property dispute among the brothers They were living separately for quite sometime before the incident There was also no joint property about which there could be any dispute between them Thus, there was no occasion for holding the Panchayat Further, the Panchayat could not be held without prior intimation to the other party Admittedly, Ram Raj Singh had no prior information of the holding of Panchayat There is nothing on record to establish that he had also agreed for the Panchayat and to be there It cannot be believed that he along with the other co-accused reached there of his own

19 Although Ram Awadh, Pradhan of the village, was also present in the Panchayat, he has not been examined as a witness Similarly, the Chowkidar, Sahbul, who, according to P W 1 Smt Rumali Devi, was also present, has not been examined They would have been the best persons to depose regarding the holding of Panchayat Thus, the fact that the Panchayat was held as alleged by the prosecution also becomes very doubtful

20 Emphasis was laid on the testimony of P W 5 Sangram Singh, ex-Pradhan of village Saraiya According to the prosecution, a Panchayat was held in front of his Baithak If we go through his entire statement, we find that he has given a wavering and half-hearted statement He has stated that when he receded to his Osara, he heard the firing of 2-3 shots It is also in his statement that he saw Ram Raj, Shyam Nain and Vijai weilding Lathi, but he could not say as to who others were along with them He claims to have intervened in the fight in which he also got a Lathi blow Thereafter he went inside his Osara It is also important that in his cross-examination he has stated that before the Marpit started, there was an altercation between accused Ram Raj Singh and deceased Brahma Singh

He, however could not give an account of it nor could say that there was an exchange of abuses All this creates a grave doubt of his presence in the Panchayat It is also very important that although he claims to have received a Lathi blow, he did not mention it to the Investigating Officer in his statement u/S 161, Cr P C nor he was medically examined He has admitted that it was for the first time that he was saying so P W 1 Smt Rumali Devi has also stated that when Sangram Singh intervened in the fight he also received Lathi blows on his arm and back Had it been a fact, Sangram would certainly have mentioned this fact to the Investigating Officer and also got his injuries examined In the circumstances, we are not satisfied that Sangram was present in the Panchayat This along with other attending facts and circumstances, as mentioned above, regarding holding of Panchayat itself becomes a doubtful event

21 Whether the dead body recovered from the river Rapti was of Brahma Singh is also very doubtful Admittedly P W 1 Smt Rumali Devi, wife of deceased Brahma Singh, did not go to the river She admits that she did not see the dead body P W 2 Vindhyachal, the real brother of the deceased, claims to have seen the dead body He, however, states that the eyes were not present in that body which he was shown The other witnesses including the Doctor have stated that the eyes were present in the dead body dug out from the river bed of Rapti It is also in the statement of Dr Gope that in the absence of the eyes, the severed head cannot be identified There is no dispute that both the ears and nose from the recovered head were not present In the circumstances, it was difficult for Vindhyachal to have identified the head as of his brother because of his own saying the eyes were not there and without eyes the identity of the deceased could not be fixed P W 1 Smt Rumali Devi claims to have heard 6 or 7 fires being shot from the fire arms The other witnesses have stated that there were only two fires from the Katta and the gun She had further stated to have gone to the Police Station alone for lodging the F I R P W 2 Vindhyachal however, claims that he had accompanied Smt Rumali Devi for lodging the report It is also important to note that P W 2 Vindhyachal who is the real brother of the deceased has stated that he himself did not see the accused Uma and Ram Dhani firing the shots from their respective arms at the deceased He claims to have heard the firing of shots from his house In these circumstances, the presence of this witness also at the Panchayat and to have seen the occurrence becomes doubtful

22 It may also be mentioned that admittedly Ram Raj Singh had lodged a report regarding his assault against the deceased Brahma Singh and the co-accused Shyam Nain and Uma about one and half years prior to this occurrence In the circumstances, it is difficult to believe that the co-accused Shyam Nain and Uma would have joined hands with Ram Raj Singh in the assault of Brahma Singh This also makes the participation of Shyam Nain and Uma in the murder of Brahma Singh doubtful

23 A few other facts that have come in evidence also need to be highlighted All the eye-witnesses including Smt Rumali Devi, P W , have stated that when altercation between the accused Ram Raj Singh and the deceased started, the co-accused Uma and Ram Dhani left Panchayat but soon thereafter returned there armed with a gun and a country made pistol respectively This fact, however does not find place in the FIR lodged by Smt Rumali It can also not be believed that the dead body of Brahma Singh claimed to have been buried by the co-accused Zaki-ullah in the flowing river Rapti would have remained imbedded there itself despite the current of flowing river It was not tied with any stone, sand bag or any other heavy load Hence in all probability it must have shifted the place if not floated down the current of the river In the circumstances, alleged recovery of the dead body in the flowing river bed from the same place where it was alleged to have been buried by Zaki-ullah becomes further doubtful Lastly, if the incised and punctured wounds found on the body

of Brahma Singh are ignored the four simple lacerated wounds on the head of the deceased which had not caused fracture or concussion or coagulation of blood, could not result in his falling unconscious or dead In the FIR there is no mention of how many shots had hit the deceased But since the Doctor in his deposition said that the injuries sustained may have been caused by one fire the eye-witnesses were made to say that one fire had hit the deceased All the aforesaid reasons cast a serious doubt in the story of assault as set out by the prosecution witnesses rendering the whole case suspicious and the appellants are entitled to have benefit of that doubt The appeal has to succeed

24 In view of the above discussions the appeal is allowed The conviction and sentences of the appellants are set aside they are acquitted of the charges framed against them All the appellants are on bail their bail bonds are discharged they need not surrender

Appeal allowed

1991 ALL L J 849

= 1991 Cri L J 2468

G MALVIYA AND B P SINGH JJ

Naqli and another Appellants v State of U P Respondent

Criminal Appeal No 1276 of 1986 D -5-10-1990 *

Penal Code (1860), S 300 — Murder — Motive — Failure to prove motive not fatal — However, when prosecution comes out with motive and that is not proved or is insufficient, evidence of witnesses be scrutinised with great care and caution

Motive in a Criminal Trial especially in a murder case is always relevant The reason is very simple A man is not supposed to take the life of another just for the fun of it There must be reasons which provoke or motivate a man to commit the serious crime of murder The motive has been defined as the ulterior intention i e an intention with which the desired result is achieved Thus the motive, being a state of mind there may be cases when the prosecuting agency may not be able to know as to what was the motive for a particular offence Therefore the failure of the prosecution to prove motive in a criminal trial is not always fatal especially when there is eye witness account of the occurrence and the evidence of the witnesses inspires confidence and can be placed in the category of wholly reliable evidence but when the prosecution comes out with the motive and the motive is either not proved or is held to be insufficient, the evidence of witnesses of fact has to be scrutinised with great care and caution Where it was admitted that except the dispute relating to the dismantling of boundary of agricultural field of the accused by the deceased there was no other dispute between the two families it was highly unlikely that such a dispute would provoke the accused to commit murder The motive set up by the prosecution cannot be said to be sufficient for the crime in question And accused was entitled to be acquitted by giving benefit of doubt

(Paras 16 17, 18, 25)

D N Wali for the Appellants, Dy Govt Advocate for Respondent

B P SINGH, J — Naqli and his son Vijai Pal have appealed against the judgment and order dated 16th May, 1986 passed by Special Sessions Judge Muzaffarnagar in Sessions Trial No 316 of 1983 u/S 302/34, IPC and S 25 of Indian Arms Act by which Naqli was sentenced to undergo life imprisonment for the offence u/S 302, IPC and to a term of one year's R I for the offence u S 25 of the Indian Arms Act while Vijai Pal was convicted for the offence u/S 323, IPC and was sentenced to pay a fine of Rs 200 A fine of Rs 200/- also imposed upon the appellant Naqli for the offence u/S 302 IPC

2 The case of the prosecution, as was

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*Against judgment and order of Bikram Kulrestha Spl Sessions Judge Muzaffarnagar D - 15-6-1986 unfolded in the evidence of Bhopal Singh and other witnesses may briefly be stated as follows

3 Bhopal Singh, P W 1 son of Sukhbir Singh is a resident of village Gyana Majra P S Charthawal Accused Naqli and Vijai Pal also reside in the same village Prior to the occurrence of this case, Bhopal Singh s grandfather Jabar Singh, had lodged a report against Naqli in which it was alleged that Naqli had demolished the Mend of the field of Jabar Singh Consequently, relations between the family of Jabar Singh and the accused became strained On the night of 1/2-6-1983 Sukhbir Singh deceased along with Bhopal Singh PW-1 and Indrapal PW-2 was sleeping upon his tube-well where the wheat and chaff were kept At about 4 a m accused Naqli and Vijay Pal, accompanied by one of their relation Sukbir Singh of village Raipura came there The deceased Sukhbir Singh was sleeping upon his cot at that time Both the accused and their relation Sukhbir Singh pounced upon the deceased Sukhbir Singh The deceased raised alarm as a result of which both Bhopal Singh and Indrapal were awakened Naqli then gave out that he would teach the deceased a lesson for lodging report regarding dismantling of the boundary Naqli was armed with a country made pistol at that time When Bhopal Singh and Indrapal attempted to save the deceased Sukhbir Singh, Naqli threatened them that he would shoot them if they left their place Both the accused along with their relation Sukhbir Singh then started grappling with deceased Sukhbir Singh, who in the meantime, had got up from his cot Upon the alarm being raised by Bhopal Singh and others Narendra son of Suba had also come there Naqli then fired from his country made pistol upon the deceased Sukhbir Singh and Vijai Pal and Sukhbir Singh were pressing the deceased Sukhbir Singh at that time The deceased was hit by the bullet and died on the spot It was a moon-lit night After the firing of the shot villagers from the side of the village also came there At that stage, the accused along with their relation bolted away towards East

4 A report Ext Ka-4 of the occurrence was lodged by Bhopal Singh on P S Charthawal, on 2-6-1983 at 6-40 a m S O Ram Ratan Singh, PW-7, who was posted as Station Officer P S Charthawal in June, 1983, was present upon the Police Station when the report Ext Ka-4 was lodged by Bhopal Singh S O Ram Ratan Singh PW 7, started investigation in the case as soon as the report was lodged He reached upon the scene of occurrence and carried out routine investigation During the course of investigation S O Ram Ratan Singh P W 7 had recovered a used cartridge from the scene of occurrence and had sealed it under the recovery memo Ext Ka-17 On 3-6-1983 S O Ram Ratan Singh, PW-7, had arrested accused Naqli and on the pointing out of the accused a country made pistol Ext Ka-2 was recovered from near the tube-well of the accused and was sealed under the recovery memo Ext Ka 2 Before the charge sheet could be submitted in the case, S O Ram Ratan Singh was transferred and thereafter S O Satish Chand Pachori, PW-8, who had succeeded S O Ram Ratan Singh, PW-7, as Station Officer, P S Charthawal, had submitted the charge-sheet Ext Ka-19 u/S 302, IPC in the case A charge sheet Ext Ka-23 u/S 25 of the Indian Arms Act was also submitted by S I Suresh Babu Govil, PW-9, after carrying out routine investigation

5 Sukhbir Singh of village Raipura was not prosecuted At the trial both Naqli and Vijai Pal pleaded not guilty and claimed to be tried

6 In all the prosecution examined 9 witnesses, Bhopal Singh, PW-1, Indrapal Singh, PW-2, Janak Singh-PW 3, Dr S K Sharma PW-4, Dharampal Singh PW-5, Ja Pal Singh PW-6, S O Ram Ratan Singh PW-7, S O Satish Chand Pachauri PW-8 and S I Suresh Babu Govil PW-9, in the case The accused did not lead any evidence in their defence

7 The learned Sessions Judge accepted the evidence of the witnesses for the prosecution and held that the accused were guilty of the offences with which they were charged and were sentenced as aforesaid

8 Aggrieved by the judgment and order of the trial court, Naqli and Vijai Pal have come up in appeal

9 We have heard the learned counsel for the parties and we have gone through the record of the case in the context of the arguments advanced at the Bar

10 S O Ram Ratan Singh, PW-7, has deposed about the steps which were taken by him during the course of investigation He has also stated that on 3-6-1983 he had recovered the country made pistol Ext 1 on the pointing out of accused Naqli from near the tube-well and sealed the same under the recovery memo Ext Ka-2 He also claimed that on 2-6-1983 he had recovered a used cartridge from the place of occurrence and had sealed the same under the recovery memo Ext Ka-17, S O Satish Chand Pachauri has proved the charge sheet Ext Ka-19, while Suresh Babu Govil has proved the charge sheet Ext Ka-23 and has deposed regarding the various steps which were taken by him while investigating the case u/S 25 of the Indian Arms Act against accused Naqli He has also proved the sanction of the District Magistrate Ext Ka-2 Dr S K Sharma PW-4 had conducted the post-mortem examination of the dead body of the deceased Sukhbir Singh on 2-6-1983 at 4-30 p m in District Hospital, Muzaffarnagar and had found the following ante mortem injuries upon the dead body of the deceased —

1 G S wound of entry 2 cm x 2 cm x cavity deep over left side chest 2 cm below left clavicle medial third Tattooing and blackening present The one second left rib, lacerated left lung pressed to Rt Side in superior mediastinum, lacerated Rt lung, liver and fractured both Rt Ribs

2 Abrasion 3 cm x 2 cm x over left side chest 1 cm lateral to Inj No 1

3 Contusion 6 cm x 4 cm over Rt side back lower third in post axillary line '

Dr S K Sharma PW-4, on internal examination had found that the left second rib under injury No 1 and 10th rib under injury No 3 were fractured, the memberances under these injuries were lacerated In the opinion of the Doctor, the death of Sukhbir Singh was caused due to shock and haemorrhage as a result of the abovementioned ante mortem injuries

11 Janak Singh, PW-3, has corroborated the evidence of S O Ram Ratan Singh PW-7 regarding recovery of the country made pistol from near the tube-well upon the pointing out of the accused Naqli, Head Constable Dharampal Singh PW-5 has proved the FIR Ext Ka-4, FIR Ext Ka-5, FIR Ext Ka-6, and G D Entries Exts Ka-7, Ka-8 and Ka-9, he has also stated that a sealed bundle was deposited by S O Ram Ratan Singh PW-7, in the Malkhana of the Police Station on 3-6-1983 at 9-05 p m Constable Jai Pal Singh PW-6 had taken the dead body of Sukhbir Singh on 2-6-1983 from the place of occurrence in a sealed cover and had produced and identified the same before the Doctor at the time of the post mortem examination

12 The evidence of these witnesses except the evidence of S O Ram Ratan Singh PW-7 and Janak Singh PW-3 regarding the recovery of the country made pistol from the accused Naqli and the evidence of S O Ram Ratan Singh PW-7 regarding recovery of the used cartridge from the place of occurrence has not been challenged from the side of the appellants

13 It is significant to note that the recovered country made pistol and the used cartridge were sent to the Forensic Expert for comparison and report on an application moved by the accused Naqli in this regard It appears that the report of the Forensic Expert was not in favour of the prosecution and for this reason the report was not proved by the prosecution No attempt was made to examine the Forensic Expert as a witness in the case Under the circumstances, it would be reasonable to presume that the report of the Forensic Expert did not support the prosecution theory that the used cartridge, which was said to be found on the scene of occurrence, was fired from the country made pistol, which was alleged to have been recovered on the pointing-out of the accused Naqli

14 Learned counsel for the appellants has argued that the country made pistol was planted by the investigating agency under the belief that the used cartridge was fired from the same It was further contended that when the investigating agency could take recourse to such steps the inference would be that the investigation was not fair The above contention has force If S O Ram Ratan Singh PW-7 is to be believed he had not said anything to accused Naqli and accused Naqli himself told him about the country made pistol It is highly unnatural that an accused on his own and without any persuasion would speak to the Investigating Officer about an unlicensed country made pistol Even an ordinary criminal is to be credited with average intelligence Accused Naqli must have known that he was inviting trouble when he was giving information on his own regarding country made pistol At least he was to be booked for the offence u/S 25 of the Indian Arms Act Such a conduct would not have been possible unless some pressure was applied to accused Naqli All this leads to the inference that the part of investigation relating to the recovery of the country made pistol and the cartridge was not fair It may also be pointed out here that the investigation was not only unfair but the Investigating Officers did not perform their duties in a responsible way When Sukhbir Singh of village Raipur was named in the FIR an effort should have been made to apprehend him also, but it appears that the Investigating Officers did not bother to make any enquiry regarding Sukhbir Singh of village Raipura

15 The case of the prosecution regarding the main occurrence rests upon the evidence of Bhopal Singh PW-1 and his first cousin Indrapal PW-2 we have already detailed the version of Bhopal Singh PW-1 in the statement of the case and the same need to be repeated here Indrapal PW-2 has claimed that he had come to the house of his maternal uncle Sukhbir Singh on 1st June 1983 after finishing his examination in Muzaffarnagar where he was studying Regarding the main occurrence he has corroborated the evidence of Bhopal Singh PW-1 We have examined the evidence of these two witnesses of fact in the light of the arguments advanced at the Bar and we are of the view that their evidence cannot be termed as reliable for the reasons we shall presently state

16 Let us first examine the question of motive Now motive in a Criminal Trial especially in a murder case, is always relevant The reason is very simple A man is not supposed to take the life of another just for the fun of it There must be reasons which provoke or motivate a man to commit the serious crime of murder The motive has been defined as the ulterior intention i e an intention with which the desired result is achieved Thus, the motive being a state of mind there may be cases when the prosecuting agency may not be able to know as to what was the motive for a particular offence It has been repeatedly held that the failure of the prosecution to prove motive in a criminal trial is not always fatal especially when there is eyewitness account of the occurrence and the evidence of the witnesses inspires confidence and can be placed in the category of wholly reliable evidence, but when the prosecution comes out with the motive and the motive is either not proved or is held to be insufficient, the evidence of witnesses of fact has to be scrutinised with great care and caution

17 Bhopal Singh, PW-1, in his examination-in-chief has stated that his grandfather had lodged a report against the accused Naqli for dismantling the Mend of the fields and the accused Naqli had threatened his grandfather that he would be killed In his cross examination Bhopal Singh PW-1 admits that except the dispute relating to the dismantling the Mend there was no dispute between his family and the accused Naqli He further admits that no application for demarcation of the fields, subsequent to the dismantling of the Mend was moved by his family members He also admits that no police personnel visited the village after the report regarding the dismantling of the Mend was lodged by his grandfather Ext Ka-5 is the report which was lodged by Jabar Singh against the accused Naqli for dismantling of the Mend of his fields This report Ex Ka-5 has been proved by Constable Dharampal Singh PW-5 The evidence of Constable Dharampal Singh P W 5 is admissible in evidence only to the extent that the report Ex Ka-5 was lodged by Jabar Singh at Police Station Charthawal on 12-5-1983 The FIR Ex Ka-5 is not substantial piece of evidence It is well settled that a FIR is only a previous statement of the maker and can be used only either to corroborate or contradict his evidence when he is produced as a witness at the trial In this case Jabar Singh, the person who lodged this FIR Ex Ka-5 is alive but he was not produced as a witness at the trial and as such the contents of this FIR Ex Ka-5 are of not any help to the prosecution

18 Thus, the only evidence which is admissible against the accused is that a report was lodged by Jabar Singh against the accused Naqli When there was no other dispute between the two families and when no follow up action was taken by either the police or Jabar Singh after lodging FIR Ex Ka-5 it was highly unlikely that Naqli would be provoked to the extent that he would commit the murder of deceased Sukhbir Singh It is significant to note that it was Jabar Singh and not Sukhbir Singh who had lodged the FIR Ex Ka-6 Thus the motive, as set up by the prosecution in this case, cannot be said to be sufficient for the crime in question

19 The most significant aspect of the case is that the oral evidence of these witnesses of fact is not in tune with the medical evidence on the record If these P Ws are to be believed, the deceased Sukhbir Singh was standing when the fatal shot was fired by Naqli from the front Dr S K Sharma P W 4 who conducted the post mortem examination upon the dead body of deceased Sukhbir Singh has categorically stated in his cross-examination that if the shot in question was fired from the front from a distance of about 2 feet injury No 1 was not possible upon the dead body of Sukhbir Singh He further states that injury No 1 of deceased Sukhbir Singh could not be caused if the shot was fired from front He goes on to state that injury No 1 could have been caused if the deceased was lying and the shot was fired from the upper side of the left shoulder There is absolutely no reason to doubt the evidence of Dr S K Sharma PW-4 He was the only witness of the prosecution He comes from the State Medical Service and was not connected with either the first informant or the accused He has deposed about his act which was performed by him in the discharge of his official duties and he was not likely to make false statement in the case There may be cases where the evidence of the witnesses of fact may be preferred even if the medical evidence on the record was not supporting the prosecution version of the manner of assault, but this is only done when the evidence of the witnesses of fact can be termed as wholly reliable In the present case the evidence of the witnesses of fact cannot be termed as wholly reliable and as such the medical evidence of Dr S K Sharma PW-4 leads the inference that these two witnesses of fact were not present when the occurrence had taken place

20 Another circumstance to note in this case is that there was only one gun shot injury which was caused at about 9 a m It appears a case of hit and run But Bhopal Singh PW-1 has insisted that on being awakened he saw that the accused Naqli Vijai Pal and Sukhbir had pressed his father upon the cot and that these accused had also grappled with his father Accused Naqli had even given out that he would teach the deceased Sukhbir Singh a lesson for lodging the report regarding dismantling of the Mend There was no occasion for the accused Naqli to enter into this sort of drama if he had in fact come to murder the deceased Sukhbir Singh Such a conduct was highly unnatural Further more the occurrence took place in the last hours of the night and it was still dark Whosoever has committed the murder of deceased Sukhbir Singh has chosen the dark hours of night as the time of occurrence It is obvious that the culprit was conscious of avoiding the crime in broad day light Even an ordinary criminal is expected to conceal his face by using some Dhata etc especially when he commits a crime in the dark hours of night because he is conscious of

the danger of being recognised by the persons who may happen to be present at the scene of occurrence when the crime is committed

21 Bhopal Singh P W 1 admits that he does not know the name of the father of the accused But the name of the accused's father finds place in the FIR Ex Ka-4 The contention of the learned counsel for the appellants that the name of accused's father was mentioned in the FIR Ex Ka-4 after Bhopal Singh PW-1 had consultation with outsiders, was not without force

22 Although the case of Bhopal Singh PW-1 in his F I R and in his statement u/S 161, Cr P C was that his father was sleeping upon a cot and all the three accused had pressed him upon the cot, Bhopal Singh's reversion on his evidence is that on being awakened he saw that his father was grappling with these accused When cross-examined on this point Bhopal Singh PW-1 stated that on seeing these accused, his father had got up from the cot and it was at this stage that he saw his father grappling with these accused, but this fact was not mentioned by him in the FIR Thus P W 1 cannot be termed as a witness who has been consistent in his deposition

23 It was also contended from the side of the appellants that it was highly unlikely that Indra Singh PW-2 was present on the scene of occurrence There is force in this argument It may be recalled that the occurrence took place in the night between 1/2-6-1983 and the FIR was lodged at 4-30 a m of S I Ram Ratan Singh P W 7, the Investigating Officer, is to be believed, he had recorded the statement of Bhopal Singh PW-1 and the statements of witnesses of Panchayatnama and recovery memos on 2-6-83 On his own admission, I O recorded the statement of witness Indrapal Singh P W 2 on 3-6-1983 Indrapal Singh PW-2 claims that he was present all through on 2-6-1983 It is not his case that he left the scene of occurrence or the village Mauza-Rajputana on 2nd June, 1983 Indrapal Singh PW-2 was one of the eye witnesses and if he was present upon the scene of occurrence on 2-6-1983, when the I O visited and inspected the scene of occurrence, his statement under S 161, Cr P C must have been recorded by the I O on the same day The fact that his statement was not recorded by the I O on 2-6-1983 leads to the inference that Indrapal Singh PW-2 was not present when the occurrence had taken place It was quite likely that he was called to Mauza Rajputana sometimes on 3rd June, 1983 and his name was mentioned by Bhopal Singh PW I as a witness in the FIR Ex Ka-4 because he was under the belief that Indrapal Singh PW-2 would support his version of the occurrence

24 Learned counsel for the appellants has contended that in all likelihood both, Bhopal Singh PW-1 and Indrapal Singh PW-2 not present when the occurrence is said to have taken place The reason for the presence of these two witnesses upon the scene of occurrence is said to be that wheat crop was being thrashed there Both these witnesses have insisted that they were sleeping at the tube-well because wheat was being harvested and was lying in the Khalihan which was near the tube-well But on a perusal of the site plan Ex Ka-20 which was prepared by the I O on the very next day shows that no harvested wheat or thrashing machine was shown near the place of occurrence On the other hand cherry field is shown to the north of the place of occurrence, Cherry field is shown towards the south of place of occurrence field of Jai Singh is shown to the east of place of occurrence while the fields of Nasib Singh and cherry field of Nasib Singh are shown towards the west of the place of occurrence Nowhere the harvested wheat or thrashing machine are shown The absence of the harvested wheat and the thrashing machine in the said plan lands support to the appellants' contention that the pretext for which these two witnesses of fact are said to be sleeping near the place of occurrence was not correct

25 Under these circumstances we are of the view that the evidence of witnesses of fact is not reliable and, therefore, the appellants are entitled to benefit of doubt

ORDER

The appeal is allowed The conviction and sentence passed on the appellants are hereby set aside The appellant Naqh is on bail His bail bonds are cancelled and the sureties are discharged The fine of Rs 200/-, if deposited by Naqh, shall be refunded to him

Appeal allowed

1991 ALL L J 855

1991 Cri L J 2598

R K SAKSENA, J

Indra Deva (In Jail), Appellant v The State, Respondent

Criminal Appeal No 480 of 1982, D/- 18-8-1990 *

Penal Code (1860), Ss 304, Part-I and 326 — Culpable homicide not amounting to murder — Intention to cause death or bodily injury likely to cause death must be proved — Only knowledge of grievous injury can be attributed when accused inflicted blow of Kudal, i e equipment used for digging on neck of deceased— Accused convicted under Section 326 instead of S 304-I

For conviction of the offence of culpable homicide not amounting to murder under S 304 Part-I the following two circumstances must be proved

The act by which the death is caused is done (a) with the intention of causing death, or (b) of causing such bodily injury as is likely to cuase death

Therefore, where the deceased moved his head on the left side to avoid the fall of Kudal, an equipment used for digging, on head region and, therefore, the blow landed on soft and delicate part of the body, namely, neck causing the grievous injury resulting into the death, it follows that the injury on neck region was not intended to be caused by the accused This fact takes the matter out of the ambit of clause (b) of Part I of S 304, Penal Code

(Paras 11 12)

The word 'knowledge' cannot be introduced for the applicability of Part I Clause (i) and Clause (ii) of Section 300 of the Penal Code are dealt with in Part I of S 304 provided it is a case of culpable homicide not amounting to murder As a matter of fact, the word 'knowledge' appears in Part II, which mentions that if the act is done with the 'knowledge' that it is likely to cause death, he will be punished under Part II Clause secondly of S 300 speaks of cases where the offender knows that the bodily injury was likely to cause death Example (b) given in S 300 indicates what type of knowledge is required It can, therefore, be safely concluded that the act was not done with the knowledge as is contemplated even by Part II of S 304 Therefore, the provisions of S 304 of the Penal Code do not stand attracted Regard being had to the nature of the weapon used by the accused, the knowledge that grievous injury could be caused by giving blow can be attributed to him who has, thus, committed an offence punishable under S 326 of the Penal Code (Paras 12, 13)

Mr Anil Srivastava, for Appellant, G A, for Respondent

JUDGMENT — Indra Deva, sole appellant, stands convicted under Sec 304, Part I of the Penal Code with a sentence of rigorous imprisonment for a period of 5 years, per judgment and order dated the 8th of June, 1982 passed by the then Sessions Judge, Barabanki in Sessions Trial No 53 of 1981 It would not be out of place to mention here that trial commenced on a charge of murder punishable under S 302 of the Penal Code, the provisions of which were, however, found to be not attracted as a consequence whereof the appellant was acquitted on that charge but was found guilty for committing offence of culpable homicide not amounting to murder, as stated above

2 There was a big plot numbered as 784

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*Against the judgment and order passed by Shri Umaish Chandra, S J, Barabanki, D/- 8-6-1982 in village Bamhaura Lodi within police circle Udaipur district Bara Banki The area of this plot was about 24 and a half bighas and it was known as Jheel-ki-Zamin It lies within the territorial limits of Gaon Sabha Nirwan-Nagar Yet another plot bearing number 792 known as Jungle-ki-Zamin also falls within the limits of the said Gaon-Sabha and is located in the same village Proceedings for allotment of land of these two plots were initiated and the same finally terminated sometime in January 1976 Pattas of these two plots were given, according to law, to different persons One of the them was Sheo Poojan (deceased) and another was Fakir Chand, father of the appellant Each was allotted 1 bigha land in 'Jheel-ki Zamin' i e plot No 784 These facts admit of no controversy, they are clearly borne out from the evidence of Lekhpal, Jageshwar Prasad (PW 5)

3 In this background that the deceased Sheo Poojan had been allotted 1 bigha land in Jheel-ki-Zamin by the Gaon Sabha and Fakir Chand (father of the appellant) was allotted an equal area of land of the same Jheel-ki-Zamin we may come to the prosecution case which in short, is to the effect that while Sheo Poojan (deceased) and P W 2 Ram Autar were ploughing a piece of land, which is admittedly in Jheel-ki-Zamin (plot No 784) on the 28th of January, 1980 the appellant Indra Deva reached there at about 2 p m and impressed upon the deceased and his brother Ram Autar that the land which was being ploughed belonged to him He, therefore insisted that the act of ploughing be given up The deceased and his brother on the contrary, maintained that the land was allotted to them by the Gaon Sabha There was exchange of hot words and user of filthy epithets, which was immediately followed by delivery of a blow given by the appellant by a Kudal which landed on the neck (right portion) of Sheo Poojan causing an injury, which proved fatal and the death was immediate The prosecution claims that the appellant bolted away immediately thereafter leaving his Kudal' on the scene of occurrence

4 A report of the incident was made on the same date at about 4 p m at the said police station, distance being 10 kms from the place of incident The crime was registered and after usual investigation, the appellant was charge sheeted as a consequence thereof he was committed to the Court of Session where he was tried for the offence of murder

5 The appellant denied the accusations and pleaded not guilty We do not find any specific case of the appellant in his examination recorded under S 313 of the Criminal P C The suggestions in cross-examination made on his behalf, however go to indicate that the land which was being ploughed by Sheo Poojan was allotted to the father of the appellant in the course of the same transaction in which Sheo Poojan got it from Gaon Sabha concerned The suggestions further indicate that the appellant was assaulted on the scene of occurrence He suffered injuries and retaliated in self-defence

6 The main findings of the learned trial Judge are that the land on which the incident took place was not proved by the prosecution to be the land of Sheo Poojan (deceased) and that the theory propounded in defence by making suggestion in cross-examination referred to above had no foundation It has been further remarked by the Court below that the accused too had failed to establish that the disputed land belonged to his father or that he was in possession thereof Accepting, however, the testimony of Ram Autar (P W 2) and Jhagru (P W 3), the learned Sessions Judge has held that fatal injury was caused by the appellant on the said date, time and place by a Kudal After giving reasons for not accepting the prosecution version that the case falls within the ambit of S 302 of the Penal Code the learned Sessions Judge observed that the provisions of Sec 304, Part I of the Code stand attracted He has, therefore, convicted and sentenced the appellant stated at the outset Aggrieved by the decision, the accused has come up in appeal

7 The conclusion recorded by the learned trial Court about the date time and place of

occurrence the identity of the deceased and the cause of his death which was homicidal, were not assailed before me on behalf of the appellant Having considered the material on record the medical evidence in particular, I am in perfect agreement with the court below on these points and hold that the injury suffered by Sheo Poojan was sufficient in the ordinary course of nature to cause death and the death followed as a consequence thereof

8 This brings us to the question as to who was the author of the single injury The claim of Ram Autar (P W 2) is consistent on the point that the appellant is responsible for causing injury Not only the recitals of the first information report but the evidence of Jhagru (P W 3) also corroborates this claim of Ram Autar who is real brother of the deceased His evidence cannot be brushed aside only on the ground that he is a relation and interested person The land was, admittedly lying fallow from before No crop was ever grown thereon There is, thus, no doubt that both the brothers were engaged in ploughing the land at the relevant time The learned counsel for the appellant drew my attention towards the injury detected by the doctor and urged that punctured wounds found in pleura and lungs cannot be ascribed to a Kudal blow The contention has no force A corner of Kudal may have hit that portion causing that injury exactly beneath the ribs, first and second which were found fractured Moreover the possibility that fractured ribs caused the punctured wound can also not be ruled out However the fact that Kudal was the instrument with which the injury was caused cannot be regard being had to the dimension of the (sic) which finds a mention in the first information report also It is, therefore concluded without hesitation in agreement with the court below that the appellant had inflicted that injury on the person of Sheo Poojan

9 Yet another finding of the court below on a very relevant issue needs a mention The prosecution claimed that the land which was being ploughed had been allotted to Sheo Poojan 4 years before the incident After an evaluation of the material on record, the learned trial Judge concluded categorically that the prosecution has miserably failed to establish that Sheo Poojan was allotted that specific piece of land and was in possession thereof from before the incident I have already shown above that this land was never cultivated earlier I have gone through the statement of Lekhpal (P W 5) who has stated only about the allotment of 1 bigha land to Sheo Poojan and 1 bigha land to Fakir Chand (father of the appellant) in Jheel-ki-Zamin, but his statement is silent on the point as to whether the disputed land was the portion over which he had delivered possession to Sheo Poojan or Fakir Chand This was the crux of the matter and yet it was not extracted from him, the truth has, therefore, remained buried The learned trial Court has rightly observed that the prosecution has not established its aforesaid version in regard to possession over the disputed land and he has on the same footing rightly concluded that the accused (appellant) has also failed to establish his possession or allotment of this land to his father Fakir Chand I do not find any infirmity in these findings which are upheld without hesitation I would further unhesitatingly hold in agreement with the trial Court that no right accrued to the appellant to strike, in other words right of private defence of person or property did not accrue to the appellant in any manner whatsoever

10 The appellant gave a blow with a Kudal on the person of Sheo Poojan on the said date, time and place as a consequence whereof Sheo Poojan suffered an injury, which caused his death

11 The crucial question for determination is as to what offence has been committed by the appellant The trial Court has rightly remarked that there was no intention to kill It, however, observed

> 'He fully knew that such an injury could cause the death of Sheo Poojan Therefore, the knowledge that such an injury, in the ordinary course of nature, would cause the death of Sheo Poojan can be attributed to

Indra Deva I, therefore, hold that Indra Deva had committed an offence punishable u/S 304, Part I of the Penal Code."

The learned counsel for the appellant contended that the provisions of S 304, Part I do not stand attracted. I am inclined to accept the contention for these reasons. Part I applies only in two circumstances —

If the act by which the death is caused is done (a) with the intention of causing death, or

(b) of causing such bodily injury as is likely to cause death.

12 Even the court below has remarked that the act was not done with the intention of causing death. Therefore, the first clause referred to above does not apply. For the applicability of the second clause, it is, in my opinion, necessary that bodily injury was intended to be inflicted and the same was sufficient in the ordinary course of nature to cause death. If we carefully consider the nature of the injury suffered by Sheo Poojan and keep in mind the weapon of assault we can legitimately and reasonably infer that this injury was not intended to be caused. It appears that Sheo Poojan moved his head on the left side to avoid the fall of Kudal on head region and, therefore, the blow landed on soft and delicate part of the body, namely, neck causing that injury. One in standing or sitting posture cannot suffer this injury unless he moves his neck towards extreme left, thereby allowing the weapon to fall on that portion of the neck, which was affected. It, therefore, follows that this injury on neck region was not intended to be caused by the appellant. This fact takes the matter out of the ambit of cl (b) of part I referred to above. The trial court has, in my opinion, erred in introducing the word 'knowledge' for the applicability of part I. To my mind cl (i) and cl (iii) of S 300 of the Penal Code are dealt with in Part I of S 304 provided it is a case of culpable homicide not amounting to murder. As a matter of fact, the word 'knowledge' appears in Part II, which mentions that if the act is done with the knowledge that it is likely to cause death, he will be punished under Part II. In my view clause secondly of S 300 speaks of cases where the offender knows that the bodily injury was likely to cause death. Example (b) given in S 300 indicates what type of knowledge is required. It can, therefore, be safely concluded that the act was not done with the knowledge as is contemplated even by Part II of S 304.

13 My considered view, therefore, is that the provisions of S 304 of the Penal Code do not stand attracted. The court below has erred in concluding that the case squarely falls within the ambit of Part I of S 304 of the Penal Code. Regard being had to the nature of the weapon used by the appellant, the knowledge that grievous injury could be caused by giving blow can be safely attributed to the appellant who has, thus, committed an offence punishable u/S 326 of the I P C.

14 We now come to the question as to what punishment be inflicted for committing the said offence. It may be recalled that the appellant and the deceased, each was labouring under a mistake that that portion of land of plot No 784 had been allotted to him and, therefore, this incident took place. There was no enmity between the two of any nature whatsoever. They reside in the same village and were landless persons. A single blow was given without premeditation after an altercation had ensued. The occurrence took place more than 10 years back and the appellant has, in all probability, settled down to his normal avocation. During this period he has suffered mental agony as consequence of this incident. Regard being had to all these facts and circumstances I am of the opinion that it would not be just and proper to commit the appellant to prison again in a crime of this nature after such a long gap. The period for which he has remained in jail in this crime is, in my opinion, sufficient punishment.

15 In the result, I set aside the conviction u/S 304 Part I and the sentence of imprisonment imposed therefor, instead convict him u/S 326 of the Penal Code with the sentence already undergone. The appeal is disposed of accordingly.

Order accordingly.

1991 ALL L J 859

1991 Cri. L J 2499

PALOK BASU, J

Somnath Paul, Petitioner v Ram Bharose, Respondent

Crl Appeal No 2241 of 1984, D/-22-12-1989

(A) Penal Code (1860), S 441 (as amended by U P Act 31 of 1961) — Criminal trespass — Licence to live in quarter — Revocation of — Notice to vacate quarter not proved to have been served upon accused — Accused cannot be said to be guilty of criminal trespass as defined in 2nd Part of S 441 (Para 18)

(B) Penal Code (1860), S 441 (as amended by U P Act 31 of 1961) — Criminal trespass — Licence to live in quarter — Unilateral revocation of, by licensor — Licensee retaining possession even thereafter — No intention to cause annoyance or to insult licensor can be inferred — Prosecution of licensee for criminal trespass — Not justified (Paras 26, 27, 32, 37)

Cases Referred Chronological	**Paras**
1983 Cri LJ 173 AIR 1983 SC 159 1983 All LJ 814	34
1981 Cri LJ 68 (All)	19
1980 ALJ 939	20
1979 Cri LJ 1433	21, 23
1976 Cri LJ 245	22, 24
1971 ALJ 4	28
1958 Cri LJ 1099 AIR 1958 Rajasthan 214	29
1964 (2) Cri LJ 57 AIR 1964 SC 986	31
AIR 1960 SC 160	36
1951 Appeal Cases 83	30

Mr Swami Dayal, Sr Advocate, Mr Tapan Ghosh and Mr Dayal Saran, for Appellant, Mr A R B Kher, Mr Madhav Jain and Mr D S Tewari, for Respondent

JUDGMENT — In short, the controversy in all these matters is as to whether if and when a licence to live in a quarter is revoked by a licencesor can the licensee be prosecuted for an offence u/S 448, IPC

2 Criminal Appeals Nos 207 of 1981, 208 of 1981, No 209 of 1981 and No 210 of 1981 related to matters which, according to the learned counsel for the appellants have become infructuous and on the strength of his statement these are being dismissed as not pressed These four matters related to acquittals of Ram Lakhan, Jogendra Singh, Sarabjeet Singh and Bhullau Since they are not being pressed no further discussions on the details of these appeals are necessary

3 The respondents Ram Lakhan, Ram Bharosey, Sarabjeet, Pati Ram, Ram Dayal, Phool Chand and Chhabi Lal in all these seven appeals were prosecuted on different complaints filed by Somnath Pal alleging himself to be the Vice-Chairman of Radha Swami Sat Singh Sabha, Agra, u/S 448, IPC but the magistrate, after trial, came to the conclusion that the said offence was not made out as against each respondent in each case and, therefore, after obtaining Special Leave from this Court, the complainant has preferred these seven appeals which are being disposed of by this common judgment

4 The admitted facts are that Radha Swami Sat Singh Sabha has enough landed property as also very many buildings and quarters Some of the quarters are permitted to be used by those who are employed in one or the other activity run by the Sabha Some quarters are permitted to be used by even such persons who are not employed by or connected with the activity of the Sabha Each of the respondents is trying to allege that they were permitted to live in the quarters allotted to them as a result of the contract of employment whereas in each case the Sabha has set up its plea that nothing as that happened and, in fact, each respondent was granted a licence to live in the respective quarters

5 Further proved facts are that all the respondents were in the employment of the Sabha though the commencement of each one's employment began at different dates

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Similarly all the respondents have lost their jobs at which they took up their matters before the Labour Court for adjudication

6 When the complaints ripened for decision before the magistrate, the proceedings before the Labour Court were pending In this regard, the admitted changed facts are that the Labour Court had in the meantime passed an award which was taken to this Court in a writ petition and the finding operating today is that since the Sabha was not an industrial undertaking within the meaning of Industrial Disputes Act, the Labour Court had no power to adjudicate on the issues raised through the respondents

7 Again the admitted facts are that each and every respondent had applied for permission to live in a quarter as licensee, that each application was forwarded by the Secretary to the Manager, that after recommendations of the Manager each application was forwarded to the General Manager, that the General Manager with the concurrence of the Sabha granted licence to each respondent with the specific stipulation in the written licence form that it will be open to the licensor to terminate the licence without assigning any reason as a result of which such respondent would be liable to hand over vacant possession of the quarter allotted to him

8 So, therefore, for the consideration of the present appeals in this Court two primary questions will have to be kept in view while scrutinising the evidence of the respective claimants Firstly, the licensor at no time admits that the licence to live in the quarter was in any way connected with the employment of any of the respondents and that by agreeing to the terms prescribed in the licence form each respondent had bound himself to vacate the quarters as and when his licence was terminated or revoked Secondly, each and every accused licensee's case is that the quarters were allotted to each of them as a corollary to the contract of employment, the termination of the employment was wrong and illegal They took the matter to the Labour Court on the supposed thinking that the Labour Court could grant them relief under the Industrial Disputes Act which has been denied to them on the finding that the Sabha is not an industrial undertaking, and when the matter was being tried by the magistrate the claim of each of the licensees was pending before the Labour Court and that their signing on the licence forms was not an act independent of the contract of employment

9 The other important facts to be noted is that in each case a notice has been issued by the complainant through the contents of which each accused respondent was asked to vacate the quarter in his possession by a specified date All the respondents in each appeal have denied the receipt of the notice The issuance and service of the notice will assume importance if it is held ultimately that the second part of the definition of 'criminal trespass' as amended by U P Act 31 of 1961, is attracted to the facts of the present cases

10 To begin with the discussion, it may be noted that S 441, IPC as it stands in the Central enactment will not be attracted in the State of Uttar Pradesh For a ready reference the said section is being quoted here —

"441 Criminal trespass —

Whoever enters into or upon the property in possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remain there with intent thereby to intimidate, insult or annoy such person, or with intent to commit an offence,

Or having entered into or upon such property, whether before or after the coming into force of the Criminal Laws (U P Amendment) Act, 1961, with the intention of taking unauthorised possession or making unauthorised use of such property fails to withdraw from such property, and its possession or use when called upon to do so by that another person by notice in writing, duly served upon him, by the date specified in the notice is said to commit 'criminal trespass'"

11 Sri Swami Dayal, Senior Advocate Sri Tapan Ghosh and Sri Dayal Saran Advocates have been heard on behalf of the appellant and Sri D S Tewari has been heard on behalf of the respondent in each case

12 On behalf of the appellants it was argued that the first part of S 441, IPC in the present cases, is applicable in the State of Uttar Pradesh and therefore, even if it is held that the notice was not served or not proved to have been refused the complaint allegations may be examined from the point of view of making out the offence described in the first part The learned counsel for the accused-respondents have seriously challenged this proposition It was argued that the complainant s case also have been that on the facts of the present cases the second part of S 441 (as amended by the U P Act) was attracted and therefore, the complainant cannot be permitted to change his stand at this late stage

13 In view of the rival contentions it will be beneficial to examine as to under which part of S 441, IPC the case of the accused-respondents may fall

14 In this connection one aspect requires special mention Sri D S Tewari raised a preliminary objection that the first four complaints having been earlier dismissed by the Magistrate the filing of the second complaint is barred by the provisions contained in S 300, Cr P C It may be noted that Crl Appeals Nos 207, 208, 209 and 210 of 1981 which were filed after leave applications u/S 378(4) Cr P C against the orders of acquittal were allowed have been dismissed by this Court on 8-12-1989 on the statement of the learned counsel for the appellant that he does not want to press the same These leave applications were against the order of the Magistrate dismissing the complaint in exercise of powers u/S 256(1), Cr P C for non-appearance of the complainant The basis of the argument of Sri Tewari is that the matters then proceeded as a summons case, which procedure has been followed in the present cases also and therefore, the earlier order will amount to acquittal of the accused and the said criminal appeals having been dismissed the bar of a second trial on the same charge as envisaged by S 300, Cr P C will come into play The Court s attention was drawn to the fact that specific objection to this effect was raised before the Magistrate but he dismissed the same for two reasons Firstly, the Special Leave Applications were pending in this Court and secondly, since the offence of criminal trespass was a continuing one, there was no bar in bringing in a fresh complaint after fresh notice (Underline is mine)

15 There is no force in the preliminary objection There can be no doubt that criminal trespass is a continuing offence In any case, after the State amendment which practically re-enacts S 441 of the Central Act the offence of trespass has to be treated as a continuing offence Moreover, admittedly the earlier complaints were dismissed because the complainant was absent The Magistrate had not gone into the merits of the case The Magistrate took the view that the case of the complainant depended upon the service of notice In fact, that was the objection on behalf of the complainant to the application which was moved by the accused They raised a question that being a continuing offence and the second complaint being based upon service of a fresh notice, the dismissal of the four criminal appeals by this Court against these acquittal orders cannot be taken as a bar within the meaning of S 300, Cr P C It cannot, therefore, be accepted that the dismissal of the said appeals will bar the proceedings in the second complaint which was initiated on the strength of second fresh notice As noted above it is the said fresh notice which gave rise to the complaint case which is now the subject matter of these appeals

16 Moreover, in disposing of the objections of the respondents about bar of S 300, Cr P C the magistrate had come out with a well-reasoned order as early as on 12-6-1981 The accused have not challenged the said order in any suitable proceedings and, therefore, the said order has become final between

the parties In view of this discussion there is no force in the preliminary objection which is hereby rejected

17 But that is not the end of the matter The argument which is accepted at times to uphold one plea of a particular party, strangely enough, may go against it while deciding another plea raised by it Under the second part of S 441 IPC it was imperative for the complainant to serve a notice calling upon the 'trespasser' to vacate the accommodation by a fixed date if the trespasser does not withdraw by that date he can be prosecuted and, therefore, reliance of the complainant upon his having served a notice to vacate on the accused for the second time, giving another date as compared to the date given in the first notice, thereby treating the offence of criminal trespass a continuing one within the meaning of second clause of S 441, IPC should normally preclude the complainant to resile from this stand all over again and try to argue before this Court that his case would nonetheless be covered by the first part of S 441, IPC It should not be permissible to permit the complainant to blow hot and cold together It seems strange that he should rely upon the notice to save the second complaint from being barred by the provisions of S 300, Cr P C and he proposes to denounce the said notice so as to bring the case within the first part of S 441, IPC Perhaps this inherent contradiction escaped the attention when the complainant's case was presented before the court It is, therefore, hereby held without hesitation that the complainant should confine his case to the second part of S 441, IPC and to permit him to do otherwise will result in serious injustice to the defence of the accused respondents

18 From the evidence of P W 4 Sri P S Kaushal, Advocate, it is apparent that he was a junior to Sri S K Rawat, advocate who had issued the notice on behalf of the complainant, which has been proved as Ex Ka-16 Nothing has been brought out in his cross-examination to discredit his testimony The contents of the notice, therefore, stand fully proved There now remains the question of its service He says that a registered envelope had come to his senior's chamber with some endorsement purporting to be read as "refused' When was it received, who received it who made the endorsement who was the postman when it was taken for service on the respondent are matters which are conspicuously absent No postman or anyone else from the Postal Department has been examined Even if for the sake of argument it be assumed that the endorsement may be presumed to have been made by an official, it must be noted at once that the accused has been rebutting it right from the very beginning His statement in rebuttal that no notice was ever sent to him at his address and that he had never refused it is a positive statement which is to be preferred as compared to the so-called official act which is not so stated by any witness of the said Department or office Therefore, it has to be held that the notice allegedly sent to the respondent was not proved to have been served upon him The prosecution, therefore, has failed to make out that the respondent will be guilty of 'criminal trespass' as defined in the second part of S 441 I P C and punishable u/S 447/448, IPC

19 In the case of D P Titus v L W Lyall reported in 1981 Cri LJ 68 this Court has held

> " where the entry was lawful but was said to have been converted into criminal trespass within the meaning of S 441, IPC as amended by U P Act 31 of 1961, the continuance should be shown to be with the intention of taking unauthorised possession or making unauthorised use of such property and that the occupant failed to quit on written notice to do so by the date specified therein "

20 In the case of Rashid Ahmad v Smt. Rashidan reported in 1980 ALJ 939 it was held by this Court as under (at page 940) —

> "Section 441 as amended in U P , however, says that a 'Civil trespass' would become a "criminal trespass ' even though the trespasser had entered into possession of the property merely with the intention of taking unauth

orised possession or making unauthorised use of such property if the trespasser failed to withdraw from such property, or its possession or use when called upon to do so by a notice in writing by the person dispossessed "

21-23 In case of Man Singh v State reported in 1979 Cri LJ 1433 it has been held by this Court as under —

> "Notice as contemplated u/S 441, IPC non-specification of the date by which the accused should vacate the land notice not in confirmity with S 441 Conviction of criminal trespass is not sustainable "

24 In the case of Mahabir Prasad and another v State and another reported in 1976 Cri LJ 245 it has been held as under —

> "Section 441 provides for a civil trespass converted into a criminal trespass on the service of notice on the trespasser to vacate the property Hence the notice had not been served on the accused the accused could not be convicted u/S 447, I P C "

25 It was vehemently argued on behalf of the appellant that irrespective of the question of service of notice on the respondent the evidence led makes out an offence which may be covered within the meaning of first part of S 441, IPC as amended by the State of U P and, therefore, conviction could have been recorded by the trial court on the evidence produced It was brought to the notice that the claim petition of the accused-respondent before the labour court having already been dismissed there was no bona fide claim on his part vis-a-vis retaining the disputed quarter In this view of the matter it was argued that as per the terms contained in the licence deed and the facts preceding the issuing of the notice till the date of filing of the complaint the only inference that could be drawn was that the respondents were continuing to commit criminal trespass because their very retention of the accommodation had been causing annoyance to the Sabha and its officials The statement of P W 2 namely Subedar Singh was relied upon in this respect and it was argued that the statement of Prem Prakash (P W 3) and Somnath Pal (P W 4) also go to indicate the action of the respondents in living in the quarter was causing annoyance

26 In other words, the argument proceeded that the knowledge of the fact that the licence issued to the respondent vide the licence deed (Ex Ka-4) was more than enough intimation to the accused-respondent that he has no more right to continue in possession of the quarter and in spite of it, if he lived therein, it must be presumed that he is consciously causing annoyance This argument has to be rejected for a variety of reasons discussed hereinafter When the prosecution case rests upon the fact of an entry alone which has been made with the intent to commit an offence or to intimidate, insult or annoy, or when the prosecution s case rests upon the allegation that the accused unlawfully remains in the said property with the intent thereby to intimidate, insult or annoy it becomes the duty of the prosecution to prove by cogent evidence that the said intimidation, insult or annoyance becomes resultant of any voluntary act of the accused It will be laying down a dangerous proposition if it is held that a unilateral action of a licensor in terminating the licence of the licensee itself should be interpreted as causing annoyance to the licensor because of retention of the property by the licensee in spite of the said revocation of the licence Who does not know that when a landlord or a licensor wants his tenant or licensee to vacate and the latter does not oblige, the landlord or the licensor will be annoyed or insulted? But what is the action of the accused in so doing? He continues to remain just as before Therefore, there is no intention his part to cause annoyance or insult etc The complainant cannot be permitted to say that due to one of his unilateral act the resultant annoyance, if any, is due to the accused's retaining the property In this view of the matter this argument of the learned counsel for the appellants has to be rejected on the face of it

27 It is true that where a licensor terminates or revokes the licence or where a

lessor terminates the lease of the lessee, the licensee or the lessee, as the case may be, can be held guilty of civil trespass, but certainly on these facts alone criminal trespass would not be made out

28 In the case of Babu Ram v State reported in 1971 ALJ 4 it was held that

> This criminal intent, in fact, distinguishes the offence of criminal trespass from a mere 'civil trespass for which remedy lies by resort to civil litigation A plea of bona fide claim of right to possess property in a defence to a prosecution for 'criminal trespass could be said to be similar to a plea of an exception from criminal liability

29 In the case of Jawanmal v Smt Bhanwari and others reported in AIR 1958 Raj 214 1958 Cri LJ 1099 it has been held as under (at page 216 of AIR 1958 Raj)

> In a case under the section where the accused claims that he had entered under a bona fide claim of rights the first thing which the court has to see is whether the claim is bona fide

30 In the case of Sinnasamy v King reported in 1951 Appeal Case 83, the Privy Council interpreting S 427 of the Penal Code as applicable in Ceylon has held as under

> "The entry upon land made under a bona fide claim of right however ill-founded in law the claim may be does not become criminal merely because foreseen consequence of the entry is annoyance to the occupant To establish criminal trespass the prosecution must prove that a real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that any claim of right was a mere cloak to cover the real intent or, at any rate, constituted no more than a subsidiary intent "

31 In the case of Smt Mathri v State of Punjab reported in AIR 1964 SC 986 (1964) (2) Cr LJ 57 it has been observed by the Supreme Court as under (at page 991 of AIR 1964 SC)

> "The correct position in law may, in our opinion, be stated thus In order to establish that the entry on the property was with intent to annoy, intimidate or insult it is necessary for the Court to be satisfied that causing such annoyance intimidation or insult was the aim of the entry, that it is not sufficient for that purpose to show merely that the natural consequence of the entry was likely to be annoyance, intimidation or insult, and that this likely consequence was known to the persons entering that in deciding whether aim of the entry was the causing of such annoyance, intimidation or insult the court has to consider all the relevant circumstances including presence of knowledge that its natural consequence would be such annoyance intimidation or insult and including also the probability of something else than the causing of such intimidation insult or annoyance being the dominant intention which prompted the entry

32 In view of the aforesaid discussion it cannot be said that the respondent was intending to cause annoyance or insult to the appellant by his very fact of retaining possession of the quarter even after having come to know that his licence stood terminated or revoked

33 Before parting with the case only one point may be adverted to and that relates to the claim of the accused that his matter of employment was intrinsically connected with the permission to live in the quarters allotted to him It is admitted position that the accused had taken the matter to the Labour court where it remained pending for several years A writ petition was to this Court at the behest of the complainant that these proceedings were not in accordance with law as the Sabha would not be termed as 'industrial undertaking or 'industrial organisation within the meaning of U P Industrial Disputes Act It is notable that the accused had been taking the plea of linking up the accommodation with the employment though the complainant emphasised that the permission to live in the quarter as licensee was in no way connected with the right of his employment

34 In this connection the trial court rely

ing upon the decision of Kanwal Sood v Nawal Kishore (AIR 1983 SC 159 (equivalent to 1983 Cr LJ 173 1983 Cri LJ 173 The Supreme Court has held as under (at page 175 1983 Cri LJ)

> In order to satisfy the conditions of S 441 it must be established that the widow entered in possession over the premises with intent to commit an offence A bare perusal of the complaint makes it abundantly clear that there is absolutely no allegation about the intention of the widow to commit any offence or to intimidate insult or annoy any person in possession The appellant-widow may be fondly thinking that she has a right to occupy the premises even after the death of S (testator)

35 In the case of Kanwal Sood the U P amendment was noted by the Supreme Court The argument of the learned counsel for the appellants relying upon the said case was that in the present complaint cases there is specific averment/allegation that the accused-respondents were living/retaining possession with the intent to insult and annoy the complainant It was thus argued that notwithstanding the fact that the accused were linking up possession with their employment the fact that the mere living in the quarter was causing annoyance should be interpreted to bring the case within the meaning of the four corners of first part of S 441 I P C

36 On the other hand reliance was placed by the accused s counsel upon the decision of Punjab National Bank v A I P N B E Federation reported in AIR 1960 SC 160 wherein it has been held as under (at page (176)) —

> "Where by reason of their participating in a pen-down strike, the employees entry into the premises of the employer is unlawful or their continuance in the premises becomes unlawful, but the sole intention of the employees obviously is to put pressure on the employer to concede the demands then even the strikers might know the strike may annoy or insult the officers it is difficult to hold that such knowledge would necessarily lead to the inference of intention requisite for constituting criminal trespass

37 This decision is complete answer to the arguments advanced on behalf of the appellants The respondents cannot be saddled with the intent to cause annoyance to the complainant by the mere fact of living in the quarter even if it be held that they had knowledge of revoking the licence to live therein For the reasons stated above this distinction is a cry in the wilderness for what should have been intended resultant of an independent action of the accused, should not be permitted to be inferred if such a resultant comes into being at a unilateral action of the complainant

38 For the reasons discussed above there is no force in these appeals which are hereby dismissed This judgment will govern the other connected appeals also

39 As regards Criminal Revision No 578 of 1985 the facts and grounds are same and similar The only difference in this case is that the police had submitted a charge sheet u/S 448 IPC the magistrate tried the said case also along with the aforesaid complaint cases and recorded an acquittal The additional fact is that the State of U P has not filed any criminal appeal but has acquiesced to the order of acquittal The complainant has filed this revision against the aforesaid acquittal

40 For the reasons stated in the connected complaint cases this revision too is without any force and is hereby dismissed

Order accordingly

1991 ALL L J 866

R B MEHROTRA J

Trust Asha Mai Dharmshala Hardwar Road, Rishikesh Petitioner v The Additional District Judge (III) Dehradun and others Respondents

C M W P No 15504 of 1988 D/ 19 3 1991

(A) U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (1972), Ss 3(i), 14 — Nature of building — Mere user of building cannot be determinative — Mere permission by landlord to tenant to use residential building for non residential purpose — Building would not become non residential building

(Paras 23, 24, 26, 34)

(B) U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (1972), S 15 — Scope — Deemed vacancy — No obligation on landlord to give intimation of vacancy to District Magistrate

(Para 32)

(C) U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (1972), S 12(3) — There is no time limit for declaring premises to be vacant under Section 12(3) — Landlord can approach for declaration any time

(Para 35)

Cases Referred Chronological	Paras
(1984) 1 All Rent Cas 65	15
AIR 1983 SC 1239	20
1983 UPLT NOC 28 (1982) 2 All Rent Cas 504	15
1982 All LJ 754 (1982) 2 All Rent Cas 325	11 24
AIR 1977 SC 1569	11 12 13 24

M M Ghildyal for Petitioner

R B MEHROTRA, J — By means of present writ petition, under Art 226 of the Constitution the petitioner has challenged the order of the Rent Control and Eviction Officer Rishikesh District Dehradun dated 2 5 1986 by which the Rent Control and Eviction Officer rejected the petitioner's application for treating the premises in dispute to be vacant and the order dated 11 7 1988 of the Additional District Judge (III) Dehradun, dismissing the petitioner's revision, filed against the order of the Rent Control and Eviction Officer dated 2 5 1986

2 The controversy involved in the case is as to whether the premises in dispute has fallen vacant or not? The two courts below have held that the tenant respondent No 3 continued to be the tenant of the premises in dispute and the premises did not fall vacant under the provisions of Section 12(3) of the Uttar Pradesh Urban Building (Regulations of Letting Rent and Eviction) Act 1972 (hereinafter referred to as 'the Act)

3 The necessary facts for the decision of the case in brief are as under

The accommodation in dispute is a portion of Dharamshala known as Asha Mai Dharmshala situated at Haridwar Road, Risikesh and is managed by a Trust The petitioner is the President of the Trust. In the year 1958, the accommodation in dispute, comprising of four rooms (16' x 12' 14' x 12' and 12' x 12' along with Varandah, Kitchen, latrine bath and one room 12' x 8' which was used as a shop) was let out to Chatar Sen Jain respondent No 3 Admittedly the accommodation in dispute was let out for residential purpose In the year 1967, the respondent No 3 purchased of premises of 6 Malviya Road, which situates within the municipal limit of Rishikesh

4 The case of the petitioner is that after purchasing aforesaid property the respondent No 3 constructed the said house and added number of living rooms The said construction was done without taking premises of the Municipal Board Consequent thereto, a notice was given by the Nagar Palika to respondent No 3 in reply of the said notice, which has been filed as Annexure-2 to the writ petition, which is not disputed the respondent No 3 stated that the house, which

the respondent No 1 has purchased has not yet been completed and the reply should be treated as an information that the respondent No 3 is going to construct the house By another letter addressed to Executive Officer Municipal Board Rishikesh the respondent No 3 prayed for sanction of his map wherein it was stated that on the northern side of the house in upper portion a two room flat is being constructed and rest of the house remains the same The map should be sanctioned at a very early date Along with the aforesaid letter a map was also enclosed This letter and the map has been filed as Annexure 3 and 4 to the writ petition The petitioner further alleged that initially there were three rooms in the building when it was purchased by the respondent No 3 Respondent No 3 subsequently constructed 8 more rooms kitchen latrine and bath rooms It has also been stated by the petitioner that apart from this the respondent No 3 has also constructed a big market comprising of 37 shops at Railway Road Rishikesh However the said statement has no relevance to the controversy involved in the present matter The controversy involved confines to the question as to whether after constructing a new house at 6 Malaviya Road and having shifted with his family from the house indispute to premises at 6 Malviya Road in the same city whether the house in dispute has fallen vacant under Section 12(3) of the Act or not

5 The case has a chequered history One Sri Y P Dhuliya made an application on 4-3-1982 for allotment of the premises in dispute on the ground that the respondent No 3 has built a residential building in the same city and has shifted residence from premises in dispute. The building is vacant under the provisions of Section 12 of the Act As such the same should be allotted to the applicant On the application of Sri Y P Dhuliya, the Rent Control Inspector visited the premises on 4 3 1982 and found that the respondent No 3 was in occupation of four rooms kitchen latrine, bath and one shop at 6 Malviya Road Rishikesh A copy of the report of the Inspector has been filed as Annexure-5 to the writ petition On the request of the respondent No 3 an inspection was made by the Rent Control and Eviction Officer himself on 13-7 1982, who in his inspection note stated that respondent No 3 was not using the accommodation in dispute for residential purpose but had only stored sacks in the room The copy of the inspection note has been filed as Annexure 6 to the writ petition After exchange of affidavits and hearing parties the Rent Control and Eviction Officer by his judgment dated 27 8-1982 declared the premises to be vacant The contention of the tenant that the accommodation in dispute was not a residential accommodation was negatived However later on, on application made by respondent No 3 the Rent Control & Eviction Officer by his order dated 22 12-1982 reviewed his earlier order dated 27-8 1982 and held the premises in dispute is not vacant Aggrieved by the aforesaid order the petitioner preferred a revision to the learned District Judge, who allowed the revision by his order dated 23-9 1983 and held that the application for review itself was not maintainable Aggrieved by the aforesaid judgment of the District Judge, the respondent No 3 filed a writ petition, which was numbered as writ petition No 11781 of 1983 and this Court dismissed the writ petition vide its judgment dated 17-4-1983 At that stage the Hon ble High Court took a view that the question of vacancy can be decided at a stage, when the premises is either allotted in favour of some body or the same is released in favour of the landlord The question of vacancy was left open by the High Court to be decided after the premises in dispute is either released in favour of the petitioner landlord or is allotted in favour of some body else

6 Subsequent to the judgment of the Hon ble High Court, the premises in dispute was released in favour of the petitioner by the order of the Rent Control and Eviction Officer Rishikesh, Dehradun dated 25-4-1984

7 Aggrieved by the aforesaid order the respondent No 3 preferred a revision before

the District Judge Dehradun which was transferred to Additional District Judge Dehradun, who again allowed the revision of respondent No 3 and remanded back the matter to the Rent Control and Eviction Officer for reconsideration This time the matter after having been remanded the Rent Control and Eviction Officer vide his order dated 2 5 1986 rejected the petitioner's application and held that the premises in dispute is not vacant Aggrieved by the aforesaid order the petitioner preferred a revision which has also been rejected by the Additional District Judge (III) Dehradun vide his judgment dated 11 7 1988 Both these judgments of the Rent Control and Eviction Officer dated 2 5 1986 (filed as Annexure 22) and the judgment of the Additional District Judge Dehradun dated 11 7 1988 (filed as Annexure 25) are under challenge in the present writ petition

8 I have heard Sri L P Nathani Senior Advocate as counsel for the petitioner and Sri Ravi Kiran Jain Senior Advocate as counsel for the respondent

9 The Rent Control and Eviction Officer recorded a finding that the accommodation in dispute was a non residential accommodation As such the provisions of Section 12(3) of the Act are not attracted and the premises in dispute cannot be declared to be vacant Accordingly he rejected the petitioner's application for declaration of vacancy in respect of the aforesaid premises The Rent Control and Eviction Officer has however also held that since prior to 15 6 1976 the tenant was in occupation of the accommodation in dispute for non residential purposes So his tenancy stands regularised under the provisions of Section 14 of the Act and held that for this reason also the premises cannot be deemed to have fallen vacant under Section 12(3) of the Act

10 The revisional court affirmed the findings of the Rent Control and Eviction Officer and held the accommodation in dispute to be non residential premises and further held in view of the fact that since the accommodation in dispute was non residential the provisions of Section 12(3) of the Act are not attracted The revisional Court also held that it is not clear from the record that the respondent No 3 constructed the building at 6 Malviya Road Rishikesh prior to enforcement of U P Act No 13 of 1972 As such if the residential accommodation at 6 Malviya Road Rishikesh, was constructed after the year 1972 the provisions of Section 12(3) of the Act will be attracted

11 Sri L P Nathani the learned Advocate made two submissions before me Firstly that the finding of the Rent Control and Eviction Officer and the IIIrd Additional District Judge holding the accommodation in dispute to be non residential was patently illegal and was contrary to the mandate of the statute He submitted that the nature of the accommodation is to be determined on the basis of the nature of the construction of the building and not on the basis of the nature of the user of the building The user of the building cannot change the nature of the building In the present case it is admitted on record that initially the building was a Dharmshala and four rooms were let out to respondent No 3 for residential purposes and they continued to be used for residential purposes till respondent shifted his residence at 6 Malviya Road Rishikesh Only after that the respondent No 3 used the premises for non residential user As such mere non residential user of the premises cannot be the criteria for holding the building to be non residential Sri Nathani submitted that the findings of the both the courts below were vitiated in law as due to wrong approach of the problem the courts below have held the premises to be non residential In support of his contention, Sri Nathani cited the decisions in Busching Schmits v Oenghani reported in AIR 1977 SC 1569 and R C Mollick v Additional District Magistrate Civil Defence R C & E C Allahabad reported in (1982) 2 All Rent Cas 325 (1982 All LJ 754)

12 In the later case learned single Judge of this Court has followed the earlier Superme Courts decisions in Bushing Schmits case (AIR 1977 SC 1569) and have held that

In my opinion the present purpose of use to which the building is being put ought not to be the sole or conclusive test, for otherwise it would be so easy both for the tenant as well as for the landlord Completely to frustrate the object and purpose of the Act by putting the building for a length of time to a non residential purpose thereby taking it wholly out of the grip or reach of the Rent Control Authorities who are charged with the duty of meeting the acute crisis prevailing in Urban areas in regard to residential accommodation In my judgment the power of the Rent Control Authorities to let and release residential accommodation cannot be taken away or thwarted by such substerfuges or fortuitous circumstances as the use to which a building may have been put at any given moment or event for some length of time however short though it may

13 Sri Naithani pointed out from the record of the case that it was admitted to the respondent tenant that he was initially living in accommodation in dispute and later on he has shifted his residence from the accommodation in dispute to the premises at 6 Malviya Road Rishikesh and had been using this premises as his godown The decision of this Court relying on Bushing Schmitz case (AIR 1977 SC 1569) is very clear on the point that mere user will not be determinative of the nature of the accommodation The nature of accommodation will depend on the nature of the construction of the building the situation of the building purpose for which the building was constructed and such other practical aspects, which can be determinative of the nature of the accommodation Sri Naithani specifically referred to the report of the Inspector (filed as Annexure-5 to the writ petition) wherein it is specifically stated that the respondent tenant has admitted that he was living in the accommodation in dispute with his family Paragraph 3 of the report is specific about it Likewise another report of the Rent Control Inspector dated 6 10 1982 (paragraph 4) shows the nature of the Building which shows that four rooms of the Dharmshala are attached with the facility of Kkitchen bath room latrine etc Several other documents referred to by Sri Naithani being report dated 29 9 1982 (Annexure 9 to the writ petition) also demonstrates that the building was of residential character Sri Naithani submitted that in the face of these evidence the courts below were highly unjustified in taking the view that the building was non residential

14 On the second point Sri Naithani submitted that the revisional court has erred in law in arriving at a finding that proviso 2 of the Section 12(3) of the Act is not attracted Sri Naithani's contention is that there was ample evidence on record to prove that the building was constructed prior to 15 7 1972 and the revisional court has failed to take the aforesaid evidence into consideration, the finding of the revisional court that the building has been constructed after 15 7 1972, is patently perverse and is based on non consideration of material evidence on record. The submission is that this finding of the revisional court has been recorded ignoring the material evidence on the record As such the judgment deserves to be set aside and the matter should be remanded back to the revisional court for deciding afresh for the decision of the aforesaid question after taking into consideration the evidence produced by the petitioner landlord for proving that alternative residential accommodation in the same city was constructed by the respondent tenant prior to the enforcement of the Act Sri Naithani has referred to the evidence which has not been taken into consideration by the revisional court and which was available on the record for contending that this material evidence was completely ignored by the revisional court In the objection filed by the respondent No 3 himself in the court of Rent Control and Eviction Officer in reply to the application moved by Sri Y P Dhuliya, in

paragraph 7 the respondent tenant has stated as under —

"Facts are that the objector/sitting tenant constructed his own house at 6 Malviya Marg Rishikesh, about in the year 1968 and since thereafter he is living with his family in his own house Any contention contrary to this is wrong and denied"

This statement is at page 85 of the paper book and this is a part of the objection filed by the respondent No 3 himself on 12 5-1982 Then Sri Nathani referred to Annexure-1 of the writ petition, which is a notice, given to the respondent by the Municipal Board, Rishikesh at page 11 of the paper book The said notice is dt. 20-6-1969 wherein it has been stated "you have constructed your house without any information to the Municipal Board" This notice is addressed to Respondent No 3, at 6 Malviya Marg address Sri Nathani referred to Annexure 2 page 12 of the paper book in which the respondent No 3 admitted the construction of the house and stated that only some small work is left, in completing the construction Then another letter of respondent No 3, which has been filed as Annexure 3 to the writ petition, wherein the respondent No 3 has admitted that the house is being constructed at 6 Malviya Road, Rishikesh, wherein in paragraph 3 of the report of the Rent Control Inspector, respondent No 3 has admitted that now he is living at 6 Malviya, Road, Rishikesh. This statement is at page 17 of the paper book Then at page 24 of the paper book (Annexure 8) wherein there is a statment of one Jugul Kishore Kapoor, who has stated that Chatar Sen has celebrated the construction of his house 14 years' back and since then he is residing in the said house Sri Nathani's submission is that the revisional court has not at all cared to even discuss or refer these statements and have jumped on the conclusion that respondent No 3 has constructed the house after 1972 and erred in holding that proviso to Section 12(3) of the Act is not attracted and the building cannot be deemed to be declared to be vacant For convenient reference, the relevant portion of Section 12 of U P Act No 13 of 1972 is reproduced below —

12 Deemed vacancy of building in certain cases —

(1) A landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if —

(a) he has substantially removed his effects therefrom, or

(b) he has allowed it to be occupied by any person who is not a member of his family, or

(c) in the case of a residential building, he as well as members of his family have taken up residence, not being temporary residence, elsewhere

(2) In the case of non residential building, where a tenant carrying on business in the building admits a person who is not a member of his family as a partner or a new partner, as the case may be the tenant shall be deemed to have ceased to occupy the building

(3) In the case of a residential building, if the tenant or any member of his family builds or otherwise acquires in a vacant state or gets vacated a residential building in the same city municipality, notified area of town area in which the building under tenance is situate, he shall be deemed to have ceased to occupy the building under his tenancy

Provided that if the tenant or any member of his family had built any such residential building before the date of commencement of this Act, then such tenant shall be deemed to have ceased to occupy the building under his tenancy upon the expiration of a period of one year from the said date"

15 For the proposition that if the material evidence ignored, a finding of fact, recorded by the courts below is not binding, Sri Nathani has relied upon the following decisions —

(1) (1982) 2 All Rent Cas 504 (1983 UPLT NOC 28), B P Sewal v District Judge, Dehradun (Para 16)

(2) (1984) 1 All Rent Cas 65, Har Prasad Verma v IIIrd Addl District Judge, Mathura (Paragraph 4)

16. In reply to the aforesaid submissions Sri Ravi Kiran Jain, learned Senior Advocate

for the respondent has made the following submissions —

(1) Admittedly on the own showing of the petitioner landlord, a fresh tenancy has come into existence on 13 4 1971 in respect of the premises in dispute, the premises was let out by the petitioner landlord in favour of the respondent tenant for non residential user, as such, the premises can not be to have fallen vacant on the ground that the respondent tenant constructed a new building prior to 15 7 1972

(2) That the petitioner landlord was under an obligation to intimate the vacancy to the Rent Control and Eviction Officer under Section 15 of the Act The petitioner having not done so, petitioner landlord loses his right from moving application for release of the premises

(3) Since the tenancy has come into existence in the year 1971 for non residential purposes and the said tenancy having been regularised under Section 4 of the Act for non-residential user, the premises cannot be deemed to be vacant under Section 12(3) of the Act in view of overriding effect of Section 14 of the Act.

(4) The petitioner landlord should have approached the court within reasonable time and since the alleged vacancy arose in the year 1968 and the landlord decided to move the application only in the year 1981 after a lapse of 13 years' the petitioner landlord should not be heard, as he loses his right to move an application for deemed vacancy by acquiescence and the application is liable to be rejected on the ground that the same was moved much after a reasonable time

17 Elaborating the aforesaid submissions Sri Jain contended that the petitioner has himself admitted in paragraph 12 of the writ petition that fresh tenancy has come into existence i e on 13-4 1971. so the application for declaring the premises to be vacant could have been entertained only on the allegation that the respondent tenant has built another residence after 13-4-1971 In the present case the allegations are that the respondent tenant has constructed building some time in the year 1968 As such the application was not maintainable and was liable to be rejected

18 Elaborating the second point Shri Jain contended that under Section 15 of the Act. an obligation has been cast on the landlord as well as on the tenant to intimate the vacancy to the District Magistrate Since admittedly the present petitioner landlord has not intimated any such vacancy the petitioner landlord loses his right to get the premises released in his favour In this view of the matter the petitioner's writ petition deserves to be rejected as he has lost his right for getting the premises released in his favour

19 The further submission of Sri Jain is that on the own showing of the petitioner landlord a fresh tenancy has come into existence in the year 1971 The earlier history of the case in respect of the premises in dispute stands washed out Admittedly right from 1971 till the application was moved for declaring the premises to be vacant i e in the year 1981, for 10 years the premises was being used for non residential purposes within the knowledge of the petitioner-landlord and any irregularity in that connection stands regularised by the overriding effect of the provisions of Section 14 of the Act As such, now it is not possible for any court to determine the question as to whether the premises in dispute was a residential premises or a nonresidential premises Since non-residential user of the building also stands regularised by the overriding effect of Section 14 of the Act, Section 12(3) of the Act will have no application in the said case

20 Lastly Sri Jain has contended that since the application for declaring the premises to be vacant was moved after a lapse of 13 years, on technical ground of the building being used for non residential purposes, such a belated application should not be entertained and in support of the aforesaid contention Sri Jain relied upon a decision of Supreme Court in Munsa Ram v S P Pathak, reported in AIR 1983 SC 1239 Sri Jain has submitted that in view of this submission the petitioner's case deserves to be dismissed as these submissions completely nullify the stand of the petitioner and this Court should not entertain the writ petition as the petitioner's case is legally untenable in law and no useful purpose will be attained by remanding the case back to the revisional court as on the basis of these contentions raised by Sri Jain the application of the petitioner landlord is bound to be rejected

21 I have heard Sri Nathani in rejoinder also who has countered the submission of Sri Jain on all the aforesaid points

22 Sri Jain has raised the contentions which do not find any consideration in the judgments of the courts below except a reference in the judgment of the Rent Control and Eviction Officer regarding regularisation of tenancy under Section 14 of the Act but the said reference even does not attempt to make out a point which Sri Jain has tried to point out under Section 14 of the Act Therefore, before dealing with the submission of Sri Jain, it must be made clear that the aforesaid submissions have been made for the first time in this court and were never raised on behalf of the respondent tenant either before the Rent Control and Eviction Officer or beore the revisional Court The first question which requires consideration is regarding the nature of the accomodation'

23 The nature of the accommodation in the present case is admittedly four living rooms of the size of 16' x 12' 14' x 12' and 12' x 12' along with kitchen bath room and latrine in a Dharmsbala were constructed for back in the year 1958 and were let out to respondent No 3 for residential purposes The respondent No 3 used the aforesaid premises for residential purposes right from 1958 till 1968 when he constructed a new house and shifted his residence to 6 Malviya Road Rishikesh By the nature of construction of the accommodation in dispute and by the fact that for more than 10 years the house was being used for residential purposes, it is clear that the house was a residential house It seems that some time in the year 1971 the petitioner landlord agreed to let out the house for non residential user i e for the purposes of using the rooms of the residential house for purposes of storing goods of respondent No 3 The question is as to whether by mere circumstances that a landlord has permitted the tenant to use a residential building for non residential purposes can it be said that the building has become a non residential building The answer is clearly in the negative as mere user of a building cannot be determinative of the nature of the building

24 This Hon ble Court in R C Mullick case (1982 All LJ 754) (supra) following the Supreme Court's Busling Schmitz's case (AIR 1977 SC 1569) (supra) has clearly held that merely the present user of the building cannot be a sole or conclusive test for determining the nature of the building In view of the law laid down by the Hon ble Supreme Court in Busling Schmitz's case (supra) the present accommodation was clearly a residential building and the courts below have erred in law in taking contrary view in holding that the building was a non residential building The finding recorded by the courts below is clearly incorrect in view of the law laid down by the High Court in R C Mullick case The finding deserves to be set aside I accordingly set aside the finding of the courts below to the extent that they have held the accommodation in dispute is non residential building

25 The second submission of Sri Nathani is that the revisional court committed an error in coming to the conclusion that alternative residential accommodation was constructed by the respondent tenant after 1972 It did not consider the material evidence and arrived at the said finding without taking into consideration the relevant materials available on the record, which are referred to earlier in this judgment The finding of the revisional court to the extent it has held that the residential accommodation was constructed by the respondent tenant after 1972, is clearly vitiated in law and is liable to be set aside, as it did not take into consideration, the following documents which were on record —

(i) Objection filed by respondent No 3 in reply to the application moved by Shri Y P Dhulia.

(ii) Notice of Municipal Board Rishikesh to respondent No 3 regarding construction of house at 6 Malviya Road

(iii) Respondent s reply to the notice of Municipal Board

(iv) Statement of Chitarsen

26 I accordingly set aside the finding of the Revisional Court that respondent constructed the residential building at 6 Malviya Road after 1972

27 So far as the submissions made by Sri Jain are concerned Sri Nathani has countered all the submissions on merits and has argued that these submissions should be dealt with by this Court failing which a lot of complication will arise and the revisional court will be compelled to decide the submissions made by Sri Jain which have no merits and deserve to be rejected

28 In this view of the matter I have decided to consider the submissions of Sri Jain on merits

29 The first submission of Sri Jain is that according to para 12 of the writ petitions a fresh tenancy has come into existence and the said premises can be declared to be vacant, if only after creation of fresh tenancy a new building has been construted by the tenant respondent The statements contained in paragraph 12 of the writ petition are being reproduced below —

"12 That a fresh lease dead was executed in 1971 between the trust and respondent No 3 in which it was admitted that the respondent No 3 was in occupation of four residential rooms A copy of the same is filed herewith as Annexure 13 to this writ petition Another affidavit was filed in which it was stated that the accommodation in dispute was residential accommodation and that respondent No 3 had constructed his own house. He has also constructed a market of 37 shops and is doing his business at Jukerjee Road Assessment order of the Nagarpalika was also filed. A copy of the affidavit and assessment order is filed herewith as Annexures 14 and 15 to this writ petition

30 From the aforesaid paragraph it is clear that if the entire statement is taken to be correct then only a part of the statement is that the lease was executed in the year 1971 but the sentence cannot be read out of context the entire reading of the paragraph also stresses that lease was for residential purpose Besides it the entire reading of writ petition shows that the respondent No 3 became the tenant right in the year 1958 and the said tenancy continued and execution of a lease in 1971 did not create fresh tenancy Paragraph 12 if taken to be correct then it is clear that the respondent tenant continued his tenancy in the premises in dispute and also constructed his own house and on the strength of the said paragraph itself the premises was liable to be declared as vacant The contention of Sri Jain is patently misconceived and is accordingly rejected

31 The second contention of Sri Jain is to be appreciated in the light of Section 15 of the Act For convenient reference Section 15 of the Act is being reproduced below

15 Obligation to intimate vacancy to District Magistrate

(1) Every landlord shall on a building falling vacant by his ceasing to occupy it or by the tenent vacating it or by release from requisition or in any other manner whatsoever gives notice of the vacancy in writing to the District Magistrate not later than seven days after the occurrence of such vacancy and such notice may at the option of the landlord be given before the occurrence of the vacancy

(2) Every tenant so vacating a building shall give notice thereof in writing to the District Magistrate and also to the landlord not less than fifteen days before the vacancy

(3) The notice under sub-section (1) or sub-section (2) shall contain such particulars as may be prescribed

(4) The District Magistrate on being satisfied on an application made to him in that behalf that there was sufficient cause for the landlord or the tenant not to give notice under sub-section (1) or sub-section (2) within time may condone such delay "

32 The condition stipulated cast obligation on the landlord, to intimate vacancy, to the District Magistrate only if the building falls vacant due to landlord ceasing to occupy the building or the landlord gets possession of the building from the requisition or in any other manner, there is no obligation of the landlord to give intimation of vacancy to the District Magistrate of deemed vacancy, as in the present case That being so, the petitioner did not default by not giving intimation to the District Magistrate under Section 15 of the Act for deemed vacancy nor there can be any such purpose of Section 15 The landlord has an obligation to intimate vacancy only if he vacates the premises or gets possession of the premises In this view of the matter, the contention of Sri Jain has no force and is liable to be rejected.

33 The third submission of Sri Jain, that since 1971 the building was being used for non-residential purposes and the non residential user having been regularised under Section 14 of the Act, Section 12 will have no effect on the premises is also misconceived and is liable to be rejected. For this submission, Section 14 of the Act is being reproduced here below

'14 Regularisation or occupation of existing tenants —

Notwithstanding anything contained in this Act or any other law for the time-being in force, any licensee (within the meaning of Section 2A) or a tenant in occupation of a building with the consent of the landlord immediately before the commencement of the Utter Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction (Amendment) Act, 1976, not being a person against whom any suit or proceeding for eviction is pending before any court or authority on the date of such commencement shall be deemed to be an authorised licensee or tenant of such building)'

34 Under Section 14 of the Act, the tenant has been protected from being evicted by the landlord building being declared vacant on the ground that he was occupying the premises in contravention of the provisions of the Act So far as the regularisation of the tenancy is concerned, Section 14 is aimed at regularising the tenancy of the premises, but has no relevance for determining the nature of the premises. Merely by circumstance that a residential building was permitted to be used for non-residential purpose, the nature of building will not be altered and residential building will maintain its character Merely its user with the permission of landlord will not and cannot alter the character of the building from residential to non-residential The submission is accordingly rejected

35 The fourth submission has also no force on merits Merely by lapse of time an illegality cannot be cured There is no time limit for declaring the premises to be vacant under Section 12(3) of the Act. The decision relied upon by Sri Jain is distinguishable. The landlord can approach for that purpose any time and can apply for declaration of vacancy, if the vacancy has occurred under Section 12 of the Act, irrespective of the question of lapse of time As such, the fourth submission of Sri Jain also deserves to be rejected on merit

36 In view of the above, I allow the writ petition, set aside the judgment of the Rent Control and Eviction Officer dated 2 5-86 and the judgment of the III Additional District Judge, Dehradun dated 11 7 88 and remand back the case to the court of III Additional District Judge, Dehradun for deciding afresh in the light of observation made by this judgment

37 Parties will bear their own costs.

Petition allowed.

1991 ALL. L. J 875

B P JEEVAN REDDY, C J AND R A SHARMA, J

Supreme Service Station Hapur and another, Petitioners v The State of U P and others Respondents

C M W P No 901 of 1990 D/- 21 5-1991

U P Sales of (Motor Spirit, Diesel Oil and Alcohol) Taxation Act (1939), S 3 (as amended by U P Act 8 of 1978) Registration of retail dealers — Business of motor spirit and diesel oil — Object of Act is to impose tax on first sale — Retail dealers purchasing motor spirit and diesel oil from petrol companies are not making first sale — Cannot be compelled to get registration certificate for carrying on business

The object of the Act is not to regulate petroleum and petroleum products and the trading activities of the dealers unless they make the first sale of motor spirit and diesel oil. The retail dealers, who purchase motor spirit and diesel oil from the petrol companies are not making the first sale and cannot be compelled to get themselves registered under S. 5 of Act for purpose of carrying business of motor spirit and diesel oil. First sale is effected by the petroleum companies like Indian Oil Corporation and it is from these companies, that the tax on the sale of motor spirit and diesel oil is to be charged.

(Paras 9 10, 11)

Cases Referred Chronological Paras
Civil Writ Petition No 20 of 1977 D/ 5-19-1979 8

Mr N C Rajvanshi for Petitioners, S C for Respondents

R. A. SHARMA, J — Petitioner No 1 is an authorised petrol dealer of Indian Oil Corporation and petitioner No 2 is a registered association formed by all the petrol dealers of the State of U P They have challenged the orders dated 13-6-1990, 27-6-1990 and 2-7 1990, issued by the Government of U P District Excise Officer, Ghaziabad and Excise Inspector, Ghaziabad respectively By these orders, petitioners have been required to get themselves registered under S 5 of the U P Sales of (Motor Spirit, Diesel Oil and Alcohol) Taxation Act, 1939 (hereinafter referred to as the Act.)

2. The respondents have filed counter affidavit and the petitioners have filed rejoinder affidavit in reply there to We heard the learned counsel for the petitioners and the learned Standing Counsel and the Writ petition is decided in accordance with the Rules of the Court

3 The Act is a taxing statute providing for tax on sale of motor spirit and diesel oil in the State of U P Section 3 is the charging Section S 3 as it stood before its amendment by U P Act No 8 of 1978 is reproduced below

"3 Levy of Tax — (1) There shall be levied from every retail dealer and collected in such manner as may be prescribed, a tax on the retail sales of motor spirit and diesel oil at such rate, or rates, as may be notified, not exceeding nine naya paise in the case of motor spirit, and seven naye paise in the case of diesel oil per litre on such sales"

(2) If any tax payable under sub-section (1) is not paid within the time prescribed, the prescribed authority may, in lieu thereof, recover any sum not exceeding double the amount of the tax so unpaid, or any smaller sum above the amount of the tax, which such authority may think it reasonable to recover"

Under this section tax was levied from the retail dealers on the retail sale of motor spirit and diesel oil 'Retail sale was defined by Sec 2(d) of the Act as follows

"2 (d) 'retail sale' means a sale by a retail dealer of (motor spirit or diesel oil or both) to a person for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased and includes the consumption by a retail dealer himself or on his behalf of (motor spirit or diesel oil or both) sold to him for retail sale

By U P Act No 8 of 1976 Sec 3 of the Act was amended Sec 3 as it stands after it amendment is reproduced below

3 Levy of Tax (1)(a) There shall be levied on the first sale of Motor Spirit in the State, a tax at the rate of (ten per cent) ad valorem and such tax shall be payable to the State Government in the prescribed manner by the dealer effecting such sale (b) there shall be levied on the first sale of Diesel Oil in the State a tax at the rate of eight per cent and from the date notified by the State Government for the purpose at the rate of twelve per cent ad valorem and such tax shall be payable to the State Government in the prescribed manner by the dealer effecting such sale, (c) there shall be levied at the point of first purchase of alcohol in the State a tax at the rate of 40 paise per litre for the first million liters and at the rate of 20 paise per litre for the remainder payable by the purchase and such tax shall be collected and paid in the prescribed manner to the State Government)

(2) If any tax payable under sub-section (1) is not paid within the time prescribed the prescribed authority may, in the lieu thereof recover any sum not exceeding double the amount of the tax so unpaid, or any smaller sum above the amount of the tax, which such authority may think it reasonable to recover "

4 The effect of the amendment is that the tax is now levied on first sale of the motor spirit and diesel oil, and is payable by the dealer affecting such sale Purchase and sale of motor spirit and diesel oil other than the first sale is not taxable under the Act

5 After creating liability to pay tax, the Legislature has further made provisions in the Act to ensure proper realisation of the tax and to prevent its evasion In this connection reference may be made to Sec 5, wherein provision has been made for registration of the dealer, and Sec 6, which prohibits carrying on business by any person as a dealer without registration certificate Sections 5 and 6 being relevant, are quoted below

"5 Registration of retail dealers and registration certificate — (1) Every dealer shall within three months of the commencement of the Uttar Pradesh Sales of Motor Spirit and Diesel Oil Taxation (Amendment) Ordinance 1974 or where he starts business at any place after the commencement of the said Ordinance then before starting business as a dealer register himself as a dealer by making an application in the prescribed manner to the prescribed authority and on such registration he shall be granted a registration certificate in such form and subject to such conditions as may be prescribed

Provided that the State Government or any Officer empowered by it under Section 9 may refuse to grant a registration certificate to a dealer if it or he has already cancelled or refused to renew a registration certificate previously granted to such dealer

Provided further that any registration certificate granted to a dealer under this Act before the commencement of the said Ordinance shall, notwithstanding anything herein before contained, continue to remain in force and be valid for the period for which it was granted (2) Every registration certificate granted under sub-section (1) shall expire on the 31st day of March following the date of the grant and may be renewed annually

(3) Every registration certificate shall be granted or renewed for year or part thereof on payment of such fee not exceeding five hundred rupees as may be prescribed and until fee is prescribed the following fee shall be charged —

		Rs
1	For sale of motor spirit or diesel oil or both in depots by oil companies	300
2	For sale of motor spirit or diesel oil or both through pumps	250
3	For sale of motot spirit or diesel oil or both in drums or tins by dealers other than those mentioned in 1 and 2 above	50
4	For sale of Acohol	50

"6 Prohibition of sale without registration certificate — No person shall carry on business as a (dealer) in any district without holding a registration certificate under Section 5"

Dealer has been defined in Sec 2(c) which is also extracted below

"2 (c) dealer means any person or association of persons carrying on the business of buying selling supplying or distributing motor spirit or diesel Oil or alcohol or two or more of them whether for commission remuneration or otherwise and includes any firm of Hindu undivided family and any society or club or any other association of person which sells motor spirit, diesel oil or alcohol to its members and also includes any department of the State Government or the Central Government which carries on such business

6 There are also provisions for search seizure arrest and punishment with imprisonment or fine or both for contravention of the provisions of Sec 6 evasion of payment of tax failure to supply requisite information and attempt to commit and abate the commission of the offences All these provisions have been enacted in aid of the main power namely power to impose and collect the tax conferred by the charging section The object of these provisions is that those persons who are liable to pay the tax by virtue of Sec 3 should not carry on the business without obtaining the registration certificate under Section 5 It, therefore, follows that those who owe no liability under Section 3 to pay the tax are not required to obtain registration certificate under Section 5 and the prohibition contained in Section 6 cannot apply to them

7 The aim and object of the Act is not to regulate the trade and business of every person who may be carrying on the business of buying and selling of motor spirit and diesel oil. As mentioned before, the obejct is to impose the tax on the first sale of motor spirit and diesel oil and the tax is payable by those, who affect such sale Those who do not make the first sale are not required to pay the tax and they cannot be compelled to get themselves registered under Section 5 and the prohibition contained in Section 5 cannot be extended to them Otherwise the object of the Act will be extended and enlarged so as to include with in it the regulation of petroleum and petroleum products and the trade and business connected therewith which cannot be done by the State of U P as the power to regulate the petroleum and petroleum products is conferred on the Union by Entry No 53 of List I of the 7th Schedule of the Constitution of India which is reproduced below

"53 — Regulation and development of oil fields and minerals resources petroleum and petroleum products other liquids and substances declared by parliament by law to be dangerously inflammable

8 It is on this basis that a Division Bench of this Court in writ petition No 20 of 1977 S N Srivastava and other v State of U P and others decided on 5 9-1979 has declared that the State Government cannot validly charge registration fee under Section 5(3) from the retail dealers in motor spirit and diesel oil, as the power to regulate petroleum and petroleum products belongs to the Central Government

9 An interpretation which makes the Act invalid is to be avoided That apart, a statute should be interpreted and be under stood in the sense, which effectuates the object of the Legislature The object of the Act is not to regulate petroleum and petroleum products and the trading activities of the dealers unless they make the first sale of motor spirit and diesel oil

10 Petitioners being the retail dealers who purchase motor spirit and diesel oil from the petrol companies are not making the first sale First sale as mentioned above, is effected by the petroleum companies like Indian Oil Corporation and it is from these companies that the tax on the sale of motor spirit and diesel oil is to be charged In fact the Government of Uttar Pradesh had earlier

issued an order dated 28-6-1989 to the Excise Commissioner U P informing him thereby that the right to regulate petroleum and petroleum products belongs to the Government of India under Entry No 53 of List I of the 7th Schedule of the Constitution of India and by another order dated 16 7 1988 the Excise Commissioner was informed that as the tax is to be levied at first sale, the tax shall be cahrged from the petroleum companies only, but subsequently by the impugned orders the Government of U P has asked its officials not to permit any dealer to carry on the business of motor spirit and diesel oil unless they get themselves registered under Section 5

11 For the reasons given above the State Government cannot compel those persons who do not affect the first sale of motor spirit and diesel oil to get registration certificate under Section 5

The writ petition is accordingly allowed Order dated 13-6-1990, 27-6-1990 and 2 7 1990 issued by the Government of U P District Excise Officer Ghaziabad and Excise Inspector Ghaziabad respectively are quashed. Respondents are restrained from compelling the petitioners to get themselves registered under Section 5 It is however, made clear that if the petroleum companies or any other person like them directly sells motor and diesel oil to the consumers through their petrol pumps or otherwise Which being the first sale, such persons will be required to get registration certificate under Section 5 In view of the facts and circumstances of the case there shall be no orders as to costs

Petition allowed

1991 ALL. L. J 878

S K MOOKERJI, J

Hari Om Prakash Arya Petitioner v Purshottam Das Singhal Respondents

Civil Misc. Writ Petition No 13788 of 1991 D/- 24-4-1991

U.P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, (13 of 1972), Ss 21(1)(a), 34 — U P Urban Buildings (Regulation of Letting, Rent and Eviction) Rules (1972) R 22 — Suit by lunatic persons — Procedure provided under O 32, R 15 of Civil P C — Applicability of, to eviction proceedings under U P Act — O 32, R 15 not mentioned in S 34 of U P Act or R 22 of Rules — O 32, R 15 is not applicable to eviction proceedings under U P Act

Civil P C (5 of 1908), O 32, R. 15

(Para 3)

Cases Referred Chronological Paras

1988 All LJ 436 (1988) All Rent Cas 285 3

Satish Chandra Srivastava for Petitioner S C for Respondents

ORDER — I have heard learned counsel for the petitioner

2 The petitioner is a tenant in the house in question and respondent No 1 Purshottam Das Singhal is the landlord An application under Section 21(1)(a) of the U P Act No XIII of 1972 (hereinafter referred to as the Act) has been filed by the respondent No 1 The landlord applicant has been described in the said application as under

"Purshottam Das Singhal, unsound mind, son of Sri Hira Lal through next friend Smt Ramwati Devi self resident of Gali Doongar Sain, Duliwala Mohalla, Hathras, district Aligarh "

It appears that the petitioner tenant before filing any written statement moved an application supported by an affidavit, copies whereof have been filed as Annexures 2 and 3 respectively, to the writ petition It is urged that the above application of the petitioner has been made under Order 32 Rule 15 C P C This application has been marked as paper No 10 C The Munsif, Hathras/Prescribed Authority, by his order dated 22/23-3-1991 rejected the application, 10 C By this petition the above order dated 22/23 3-1991 has been challenged

3 Learned counsel for the petitioner has urged that the application, 10 C mentioned

above should have been decided on merits as required under Order 32, Rule 15 C P C The only question arises, in the present case is whether the provisions of Order 32, Rule 15 C P C would be applicable in a proceeding under Section 21(1)(a) of the Act It is clear that provisions of the entire Civil Procedure Code have not been made applicable to the proceedings under the above Act and only some provisions of Civil Procedure Code have been incorporated in this Act by reference Section 34 of the above Act runs as under

"34 Powers of various authorities and procedure to be followed by them (1) The District Magistrate the Prescribed authority or any (appellate or revising authority) shall for the purposes of holding any inquiry or hearing (any appeal or revision) under this Act have the same powers as are vested in the Civil Court under the Code of Civil Procedure 1908 (Act No V of 1908), when trying a suit, in respect of the following matters namely

(a) summoning and enforcing the attendance of any person and examining his on oath

(b) receiving evidence on affidavits,

(c) inspecting a building or its locality, or issuing commission for the examination of witnesses of documents or local investigation

(d) requiring the discovery and production of documents,

(e) awarding, subject to any rules made in that behalf, costs or special costs to any parts or requiring security for costs from any party

(f) recording a lawful agreement, compromise or satisfaction and making an order in accordance therewith

(g) any other matter which may be prescribed

"

It is further pointed out that Rule 22 of the Rules framed under the Act runs as under

"22 Powers under the Code of Civil Procedure, 1908 (Section 34(1)(g) — (The District Magistrate the prescribed authority or the appellate or revising authority shall, for the purposes of holding any inquiry or hearing any appeal or revision under the Act shall have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 1908 when trying a suit, in respect of the following matters, namely —

(a) the power to dismiss an application appeal or revision for default and to restore it for sufficient cause

(b) the power to exceed ex parte and to set aside for sufficient cause an order passed ex parte

(c) the power to award cost and special costs to any successful party against an unsuccessful party,

(d) the power to allow amendment of an application memorandum of appeal of revision

(e) the power to consolidate two or more cases of eviction by the same landlord against different tenants

(f) the power referred to in Sections 151 and 152 of the Code of Civil Procedure, 1908 to make any order for the ends of justice or to prevent the abuse of the process of the authority concerned.)

From reading of Section 34 and Rule 22 referred to above it becomes clear that the provisions of Order 32 Rules 15 C P C had not been incorporated under the above Act by reference It is noteworthy that the above provisions have clearly mentioned the provisions of Civil Procedure Code which are applicable to the proceedings under the above Act Thus, non mentioning of Order 32 Rule 15 C P C either in Section 34 or Rule 22 will lead to the conclusion that provisions of Order 32, Rule 15 C P C are not applicable to the proceedings under the above Act. In view of the above position of law I am inclined to hold that the application of the petitioner (10 C) purported to have been moved under Order 32, Rule 15 C P C is wholly misconceived and is not maintainable Learned counsel for the petitioner has relied upon a decision of Hon'ble single Judge of this Court reported in (1988) 1 All Rent Case page 285 (1988 All LJ 436) Prabhat Sharma and another v Hari Shanker Srivastava and other This decision had no application to the facts of the present case In the above decision it appears that a suit was filed in the court of IV Additional District Judge exercising powers of Judge Small Causes Court for recovery of arrears of rent and for eviction This suit was filed in the civil court and entire procedure of Civil Procedure Code was admittedly applicable to the proceeding of the suit After decree was passed by the trial court a revision was filed which was also dismissed and thereafter in the execution proceeding objection was raised under Order 32 Rule 15 C P C However on the fact of the case the objection was turned down However in the present writ petition proceedings are before the Prescribed Authority under Section 21(1)(a) of the Act and it was certainly not a suit pending to the civil court. For the reasons given above I am reiterating that provisions of Order 32 Rule 15 C P C are not applicable to the proceedings before the Prescribed Authority

4 Written statement by the tenant has not yet been filed before the Prescribed Authority The petitioner tenant may file his written statement before the Prescribed Authority and he will be entitled to raise all points in the written statement and the Prescribed Authority shall decide all relevant points while disposing of the application under Section 21(1)(a) of the Act on merits and in accordance with law In the aforesaid application (10 C) the tenant petitioner stated that the applicant under Section 21(1)(a) of the Act had stated that her husband was of unsound mind and therefore before proceeding further in the case the wife of the landlord was obliged to establish this fact before the Prescribed Authority It is further alleged that the application under Section 21(1)(a) of the Act by the landlord, Purshottam Das Singhal, being of unsound mind, filed through his next friend wife was, therefore, not maintainable It was therefore prayed that the application under Section 21(1)(a) should be dismissed By the impugned order 22 3 1991, the application (10 C) was rejected by the Prescribed Authority The Prescribed Authority held that the applicant under Section 21(1)(a) will have to prove the facts stated in her application and in case she fails to establish the facts the application under Section 21 may fail on that ground only

5 The lerned counsel for the petitioner tenant argued that the application under Order 32 Rule 15 C P C deserves to be decided first before proceeding further in the matter In support of the above contention the learned counsel cited several decisions Those decisions are not applicable to the facts of the present case All such decisions relate to civil suits where the entire Code of Civil Procedure are admittedly applicable In view of the above findings that the provisions of Order 32 Rule 15 C P C are not applicable in a proceeding under Section 21(1)(a) of the Act the argument of the learned counsel for the petitioner is repelled. The order of the Prescribed Authority does not suffer from any legal infirmity or jurisdictional error nor there is any error apparent on the face of the record and therefore deserves no interference by this Court

6 With the above observation this petition is dismissed

Petition dismissed

1991 ALL L J 880

A N VARMA AND
G P MATHUR JJ

Gramin Charm Utpadan Sahkari Samiti Ltd Petitioner v Zila Parishad and others, Respondents

Civil Misc Writ Petition No 7712 of 1991 D/ 5 4 1991

(A) Constitution of India, Art 226 — Enforcement of contractual rights — Contract for collection of bones, hide and carcases etc — Registered Industrial Co-operative Society consisting of members traditionally

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EI/HI/A574/91/GDR/VNP

engaged in the trade available — Settlement of contract with an individual illegal

The Government Orders clearly stress that where a duly registered Industrial Co-operative Society consisting of members belonging to community who are traditionally engaged in the trade of collection and disposal of carcasses and bones etc. is available the contract should not be put to general auction but should be settled only with that Society. If therefore such an Industrial society duly registered with the Khadi Gram Udyog Board is available such contract should first be offered to such Society. Allotment of the contract to an individual is illegal.

(Para 4)

(B) **Constitution of India, Art 226 — Enforcement of contractual rights — Contract for Collection of bones, hide and carcasses etc — Auction settling contract with individual — Writ petition by duly registered society — Assertion of petitioner that it is genuine society consisting of members belonging to community engaged in the trade not rebutted — Auction cannot be sustained**

Where a clear and categorical assertion made by the petitioner registered society that it is a bonafide Industrial Co-operative Society registered under the U.P. Co-operative Societies Act by the Mukhya Karya Palak Adhikari/Registrar, Khadi Gram Udyog Sahkari Board and that it is composed of the members who belong to a section of the society which is traditionally engaged in that trade is gone almost totally unrebutted in the counter affidavits filed on behalf of the Zilla Parishad and the individual with whom the contract was settled, the auction is liable to be quashed being in manifest breach of the Government orders.

(Paras 3, 4)

(C) **Constitution of India, Art 226 — Enforcement of contractual rights — Contract for collection of bones, hide and carcasses etc. — Settlement of contract with individual through auction in breach of Govt. orders — Writ petition challenging auction — Pendency of matter with regard to approval of auction before State Government is of no consequence — Auction is liable to be quashed** **(Paras 5, 6)**

Sri Amar Saran, Advocate for Petitioner, S.C. for Respondent.

A. N. VARMA, J. — This petition has been filed against an auction dated 25.2.1991 conducted by the respondent Zilla Parishad for settling a contract for the collection of bones, hide and carcasses etc. for the year beginning 1.4.1991. The petitioner claims to be an Industrial Co-operative Society registered under the U.P. Co-operative Societies Act by the Mukhya Karya Palak Adhikari/Registrar, Khadi Gram Udyog Sahkari Board. A copy of the registration certificate issued to the petitioner under Section 8(1) of the Co-operative Societies Act has been filed with the petition as Annexure 1. The petitioner further asserts that the Society comprises members of Harijan community or backward Muslim community of Qureshies who have been traditionally engaged in the trade of collection and disposal of carcasses and bones etc. from the time of their ancestors. It is claimed that the Society has been formed for promoting the interest of its members in the collection of carcasses and bones etc. The contention is that in spite of the Government Order issued on the subject from time to time providing that a contract for collecting bonse, hide and carcasses should be settled only with such societies and not otherwise, the Zila Parishad illegally settled the contract with an individual arrayed as respondent No. 3 herein.

2. On these facts the petitioner Society has prayed for quashing of the auction dated 25.2.1991 held by the Zila Parishad. At his auction the third respondent Gulam Rasul was adjudged as the highest bidder and the contract has been settled with him.

3. Two counter affidavits have been filed one on behalf of the Zila Parishad and the other by the third respondent. It is significant to mention that a clear and categorical assertion made by the petitioner that it is a

bona fide Industrial Co-operative Society registered under the U P Co-operative Societies Act by the Mukhya Karya Palak Adhikari Registrar Khadi Gram Udyog Sahkari Board and that it is composed of the members who belong to a section of the society which is traditionally engaged in the trade has gone almost totally unrebutted All that the Zila Parishad has to say in the counter affidavit is that many contractors are trading in the name of such Industrial Co-operative Societies This is hardly any rebuttal categorical or otherwise of the positive assertion made by the petitioner that it is a genuine Society consisting of such members

4 This being so it is apparent that the impugned action cannot be sustained The contract could not be legally settled with an individual If an industrial Society is available in the Block in question the contract should first have been offered to the Society which has made the application in that behalf Allotment of the contract to the third respondent was thus in the teeth of the Government Orders true copies whereof have been annexed to the petition The Government Orders clearly stress that where a duly registered Kndustrial Co-operative Society consisting of members belonging to community who are traditionally engaged in this trade is available the contract should not be put to general auction but should be settled only with that Society It is thus apparent that the impugned auction is liable to be quashed being in manifest breach of the Government Orders

5 Sri N S Chaudhary however submitted that the respondent Zila Parishad had sought the approval of the State Government with regard to the auction proposed to be held by it and that the said matter is still pending before the State Government In this view it was urged this Court should not interfere until the State Government has taken a decision in the matter

6 We are unable to agree The matter which is pending before the State Government is one pertaining to the grant of approval of the action proposed to be taken by the Zila Parishad for settling the contract through a general auction The objection raised by the petitioner however is that a general auction was not permissible at all as a society duly registered with the Khadi Gram Udyog Board was available The pendency of the above matter before the State Government was therefore of no consequence and could not cure the fundamental defect from which the impugned auction inherently suffered

7 In the result the petition succeeds and is allowed The impugned order dated 25-2 1991 is quashed The Zila Parishad is directed to give the contract to the petitioner Society on the terms and conditions laid down in the bye laws of the auction notice The Zila Parishad is further directed to refund the sum deposited by the respondent No 3 immediately as has been prayed in the alternative by the respondent in the counter affidavit filed on his behalf

Petition allowed.

1991 ALL L J 882

A N VARMA AND K K BIRLA JJ

Laxmi Narain Petitioner v The Sales Tax Officer Orai and others Opposite Parties

C M W P No 284 of 1981 D/ 15-5 1991

(A) Constitution of India, Art 226 — Writ petition — Alternative remedy — Objection as to maintainability on ground of existence of alternative remedy — Same raised 10 years after admission — Petitioner challenging auction sale as totally void — Petition cannot be thrown out

Case law discussed

(Para 16)

(B) U P Zamindari Abolition and Land Reforms Act (1 of 1951), S 154 — Auction sale — Validity of sale of land in excess of land permitted, to be held by transferee

together with land held by him in one lot — Same is totally void being in violation of S 154 and R 281(2A) — It is not mere irregularity or mistake in publication or conduct of sale against which appeal is provided

U P Zamindari Abolition and Land Reforms Rules (1 of 1951), R 281(2A)

(Paras 17, 18)

(C) U P Zamindari Abolition and Land Reforms Rules (1951), R 285B — Auction sale — Validity — Purchaser, son of Registrar Kanungo under officer ordering sale — He is hardly 20 years old and not owning any other land — Purchase must be by kanungo i e officer subordinate to officer ordering sale indirectly through his son Auction is rendered invalid in view of R 285B

(Para 19)

(D) U P Zamindari Abolition and Land Reforms Rules, R 285 I — Auction sale — Validity — Auctioning of large area of 13 5 acres in one lot — It is material irregularity resulting in substantial injury to owner rendering auction invalid — Land if had been sold in more lots, it would have fetched more price

(Para 22)

Cases Referred	**Chronological**	**Paras**
1990 RD 412		10
1990 Lab IC 1161	AIR 1990 SC 1305	12
AIR 1990 SC 1316		13
1987 Lab IC 1901	AIR 1987 SC 21	11
1983 Tax NR 2905	AIR 1983 SC 603	10
1977 Tax LR 1871	AIR 1977 SC 1132	15
AIR 1971 SC 33		14

Mr Rajeshji Verma and Mr Ravi Kiran Jain for Petitioner S C for Opposite Parties

K K BIRLA, J — Feeling aggrieved by the auction sale dated 24-2 1981 Laxmi Narain has preferred this petition for a writ in the nature of certiorari quashing the Auction proceedings and also for not confirming the auction sale There were some Sales Tax dues on the Firm Gorey Lal Chhotey Lal on account of sales tax assessment orders for the years 1968 69 1969 70 1970 71 and 1972 73 According to the petitioner his father Chhotey Lal and his uncle Gorey Lal had died in the year 1972 The demand notices for the amount alleged to be due on the firm were served on the petitioner in March 1978 and a notice dated 19 5 1978 was served on the petitioner for auctioning his agricultural land Chak No 180 (area 13 55 acres) of village Minaura Kalpi Pargana Orai District Jalaun (hereinafter referred to as the land) for arrears of Sales Tax to tune of Rs 55 710 31 paise The auction could not take place Several dates were fixed A notice for auction showing an arrear of Rs 76 694 75 paise was served on him showing date of auction as 24 2 1981 vide Annexure 1 to the writ petition On the date of auction the bid was closed in favour of Jakir Haq son of Mohd Shafi Ansari Registrar Qanungo Tehsil Orai District Jalaun opposite party No 6 at Rs 41 000/

2 By this writ petition the legality and validity of this auction sale have been challenged on various grounds by the petitioner which will be considered at the appropriate stages On the other hand, the contesting opposite parties have supported the legality of the impugned auction sale Besides, this, the learned counsel for the opposite party No 6 (hereinafter referred as the contesting opposite party) has raised a preliminary objection According to him, if the petitioner was aggrieved by the auction sale he could have moved an application to the Commissioner under Rule 285I of the U P Zamindari Abolition and Land Reforms Rules and as such the present writ petition is not maintainable on the ground of alternative remedy

3 Affidavit, counter affidavits rejoinder and supplementary affidavit have been exchanged between the parties We have heard the learned counsel for the parties and perused the materials

4 The provisions of the Act and the Rules relevant for our purposes are given below

5 Section 154 — Restriction on transfer by a Bhumidhar (1) Save as provided in sub-section (2) no bhumidhar shall have the right to transfer by sale or gift any land other than tea gardens to any person where the transferee shall as a result of such sale or gift become entitled to land which together with land, if any held by his family will in the aggregated exceed 5 0586 hectares (12 50 acres) in Uttar Pradesh.

6 Rules 281 of Zamindari Abolition and Land Reforms Rules (hereinafter referred as Rules) and onwards deal with the sale of immovable property Rule 281(2A) provides that in the case of sale of a holding the Collector shall auction the holding in lots of 1 26 hectres (3 125 acres) to 5 04 hectares (12 50 acres) after working out and announcing the land revenue and the estimated value of each lot Rule 285 A provides that every sale under Sections 284 and 286 shall be made either by the Collector in person or by an Assistant Collector specially appointed by him in this behalf No such sale shall take place on a Sunday or other gazetted holiday or until after the expiration of at least thirty days from the date on which the proclamation under Rule 282 was issued The Collector may from time to time postpone the sale Rule 285 G provides that no sale after postponment under Rule 285A 285D or 285E in default of payment of the purchase money shall be made until a fresh proclamation has been issued as prescribed for the original sale Rule 285I provides that at any time within thirty days from the date of the sale application may be made to the Commissioner to set aside the sale on the ground of some material irregularity or mistake in publishing or conducting it but no sale shall be set aside on such ground unless the applicant proves to the satisfaction of the Commissioner that he has sustained substantial injury by reason of such irregularity or mistake

(i)

(ii) The order of the Commissioner passed under this rule shall be final

Rule 285J provides that on the expiration of thirty days from the date of the sale if no such application as is mentioned in Rule 285H or Rule 285I has been made or if such application has been made and rejected by the Collector or the Commissioner, the Collector shall pass an order confirming the sale after satisfying himself that the purchase of land in question by the bidder would not be in contravention of the provisions of Section 154 Every order passed under the Rule shall be final

7 The contention by the learned counsel for the opposite party is that the petitioner is challenging the impugned auction sale on various grounds namely, firstly that the proper procedure for publishing or conducting the sale proclamation has not been followed secondly that the auction purchaser is the son of the Registrar Kanungo and, therefore he could not bid in the auction thirdly that the sale consideration is too much inadequate and fourthly that the whole attached land could not have been sold in one lot It is contended on behalf of the contesting opposite party that all these objections relate to the publishing or conducting of the auction of sale, and that under Rule 285(1) the petitioner had the remedy to make an application to the Commissioner and as such in view of this alternative remedy the present writ petition should be dismissed

8 On the other hand it is contended by the learned counsel for the petitioner that it is not a mere case of material irregularity or mistake in publishing or conducting the auction sale but the sale is in contravention of the express provisions of law and that the Collector had no jurisdiction to sell 13 55 acres of land as this violates the provisions of law and it is a case of apparent illegality in the sale It is next contended that the case will not be covered under Section 285I and in any case the writ petition cannot be thrown out on this ground It is also contended that the writ petition was filed in 1981 and this objection has been raised after about 10 years of filing of this writ petition After considering

the contentions raised by the learned counsel for the parties in this regard we are of the opinion that it is not a fit case where the writ petition could be thrownout now on the ground of alternative remedy

9 The writ petition had been admitted on the 7th May 1981 The interim order was also passed on the same date The contesting opposite party filed his counter affidavit in December 1981 In this counter affidavit he did not raise the plea of the writ petition being not maintainable on the ground of alternative remedy nor this plea was raised by moving any separate application The point has been raised for the first time before us after 10 years of the filing of this petition In our opinion, this fact in itself will not justify the dismissal of the writ petition now on the ground of alternative remedy

10 The learned counsel for the contesting opposite party has relied on the case of Titaghur Paper Mills Co Ltd v State of Orissa reported in AIR 1983 SC 603 (1983 Tax LR 2905) and the case of Umesh Chandra v Sub Divisional Officer reported in 1990 RD page 412 In the above cited Supreme Court case the writ petitions were dismissed on account of alternative remedy being available to those petitioners as those petitioners which were provided under the Orissa Sales Tax Act In the case of Umesh Chandra (supra) the High Court did not consider the matter and directed the S D O Kunda to dispose of the petitioner s objection It may further be noted that in the above cited Supreme Court case the writ petitions were rejected on this ground in limine by the High Court and the Hon ble Supreme Court also dismissed the writ petitions preferred before it upholding the above view of the High Court No doubt in proper cases the writ petitions may be dismissed on the ground of alternative remedy but this can not be laid down as an absolute proposition of law that where the plea of alternative remedy is being raised the Court cannot exercise its power under Art 226 of the Constitution There is plethora of cases to support the preposition that alternative remedy is not an absolute bar to the maintainability of the writ petition On the other hand it is the consensus that the petition will not be thrown out if it has been entertained and has been pending since long Some of the Supreme Court cases may be referred in this regard.

11 In the case of Dr Smt Kuntesh Gupta v Management of Hindu Kanya Mahavidyalaya Sitapur (U P) reported in AIR 1987 SC 2186 it has been held that at page 2189 "further it is well established that an alternative remedy is not an absolute bar to the maintainability of a writ petition when an authority has acted wholly without jurisdiction the High Court should not refuse to exercise its jurisdiction under Art 226 of the Constitution on the ground of existence of an alternative remedy It will be discussed at the appropriate stage that the present case is not a case of mere material irregularity in publishing or conducting the sale but sale has been in violation of the express provisions of law

12 In the case of Miss Raj Soni v Air Officer in Charge Administration reported in AIR 1990 SC 1305 (1990 Lab IC 1161) it has been observed in para 11 that it is not necessary and we do not propose to go into the question in this case as to whether the petition is maintainable under Art 32 of the Constitution because this petition has been pending in this court since 1981 The petitioner s claim is just It will therefore be a travesty of justice to send her to any other forum at this stage It may be further pointed out that in this case also the writ petition was filed in 1981 and was decided in April 1990 and remained pending for about 9 years In the case before us also the writ petition has been filed in 1981 and has remained pending for about 10 years

13 In the case of Tamil Nadu Cauvery Neerppasana Vilaiporugal Vivasayigal Nala Urimai Padhugappu Sangam v Union of India reported in AIR 1990 SC 1316 even though the State of Tamil Nadu was not a petitioner but a respondent the Hon ble Supreme Court

went to the extent of treating the State of Tamil Nadu as a petitioner The Hon ble Supreme Court further held that at page 1318

In view of the fact that the State of Tamil Nadu has not supported the petitioner entirely and without any reservation and the Court has kept the matter before it for about 7 years now to throw out the petition at this stage by accepting the objection raised on behalf of State of Karnataka that a petition of a society like the petitioner for the relief indicated is not maintainable would be ignoring the actual state of affairs would be too technical an approach and in our view would be wholly unfair and unjust

14 In the case of Hirday Narain v Income-tax Officer, Bareilly reported in AIR 1971 SC 33 as well where the petitioner had filed writ petition instead of availing statutory remedy and the High Court entertained the petition and gave hearing on merits It has been held that the petition cannot be rejected on the ground of statutory remedy being not availed of It may be mentioned that in the case before us also the petition had been admitted in 1981 (thereby entertained) and has been heard

15 In the case of State of U P v M/s Indian Hume Pipe Co Ltd reported in AIR 1977 SC 1132 (1977 Tax LR 1871) it has been held that at page 1134 moreover there is no rule of law that the High Court should not entertain a writ petition where an alternative remedy is available to a party It is always a matter of discretion with the Court and if the discretion has been exercised by the High Court not unreasonably or perversely it is the settled practice of the Supreme Court not to interfere with the exercise of discretion by the High Court

16 Therefore, this will depend on the facts and circumstances of the individual case As pointed out earlier in this case the writ petition had been admitted in May 1981 even in the counter-affidavit filed in Dec 1981 this plea was not raised nor any application for dismissing the writ petition on this ground was ever made. On the other hand, this plea was raised for the first time merely after about 10 years of the admission of the writ petition In our opinion, in these circumstances it is not a fit case where the writ petition could be dismissed on this ground Apart from this, the contention of the learned counsel for the petitioner that it is not a mere case of material irregularity or mistake in publishing or conducting the auction sale but it is a case where the sale is totally void and illegal and has to be totally ignored and therefore inspite of the provisions of Rule 285 (I) this Court can and should look into the matter, can not be brushed aside lightly

17 Section 154 of the Act quoted above clearly provides that no transfer can be made in favour of a person who as a result of such sale will become entitled to land which together with land if any, held by his family will in the aggregate exceed 12 50 acres in U P In the instant case the land measuring 13 35 acres has been ordered to be auctioned in one lot The result is that auctioning 13 55 acres of land in one lot is directly in contravention of Section 154 of the Act because in that case the auction purchaser will be bhumidhar of more than land permitted by law Therefore the auction sale is clearly in contravention of Section 154 of the Act Under Rule 281(2A) also it is clearly provided that it should also be made clear that only these persons would bid in the auction acquisiton of land by whom would not contravene the provisions of Section 154 Therefore it is also obvious that auctioning whole land in one lot has not only violated the first para of sub-rule 2A but also the second para of this sub-rule This glaring illegality is not merely some material irregularity or mistake in publishing or conducting the sale and goes to the very root of the auction sale making it completely void In our opinion on this ground also, the preliminary objection raised on behalf of the opposite party deserves to be rejected

18 On the merits of the case itself, the impugned auction has been challenged on more than one ground. The main contention raised is that the impugned auction is in violation of Section 154 of the Act and

Rule 281(2A) and is void This aspect has already been discussed above We find that the impugned auction is illegal and void on this ground and in our opinion the impugned auction deserves to be quashed on this ground alone

19 The auction was also challenged on the ground of violation of Rule 285B Though not necessary this aspect may also be discussed Admittedly the contesting opposite party is the son of Mohd Shafi Ansari Registrar Kanungo Tehsil Orai, District Jalaun The land in question is situate in Tehsil Orai rule 285B inter alia provides that no person employed by or subordinate to such officer shall either directly or indirectly bid for acquire or attempt to acquire the property sold or any interest therein Such officer refers to any officer having any duty to perform in connection with any such sale Sale proclamation for Z A Form No 74 which has been filed before us at the time of the arguments and also the auction proceedings (Annexure 3) clearly show that the auction sale has been ordered by the S D O Orai Clearly enough, the father of the respondent No 1 is subordinate of the S D O Orai Counter affidavit of the contesting opposite party will show that at the time of the auction he was hardly 20 years old Annexure-4 of the counter affidavit of the contesting opposite party will show that he does not own any other land In the circumstances the contention on behalf of the petitioner that the Supervisor Kanungo had attempted to purchase this property in auction indirectly through contesting opposite party has force, and this will effect the validity of the impugned auction Though not raised during the arguments or behalf of the contesting opposite party it may be mentioned that in Annexure-4 to the counter affidavit an attempt has been made that the opposite party No 6 and his two brothers have purchased this land in auction The bid has been made by the opposite party No 6 the money has been deposited by him and as such the averments in this affidavit that it was purchased by him and his brothers cannot be accepted for a moment Rather, it appears that the contesting opposite party was alive to the illegality of the auction of 13 55 acres of land in favour of one person and has most probably therefore tried to set up this case in the affidavit filed before the S D O Orai As pointed out earlier no contentions to that effect have been made before us Here the case of the contesting opposite party is that the land has been purchased in auction by him

20 Besides these grounds the petitioner has also challenged the impugned auction on the ground that the sale proclamation was not properly published and conducted and that the land has been auctioned for grossly inadequate amount

21 As regards the point regarding publication of the sale under Rule 286 the sale proclamation has to be in Z A Form 74 Under Rule 285A at least thirty days should expire from the date on which the proclamation is issued The Collector may also from time to time postpone the sale Under Rule 285 G no sale after postponement is to be made until a fresh proclamation has been issued as prescribed for the original sale In the instant case the sale was previously postponed more than once as is clear from the narration of facts The learned counsel for the petitioner has contended that the sale proclamation was published in the Newspaper on the date fixed for auction and there was not a gap of thirty days as required under the Rules This contention cannot be accepted From the sale proclamation dated 24 3 1981 produced before us it is clear that there is a gap of thirty days from the date of its issuance and the date fixed for the auction

22 As regards the conduct of sale it has already been held above that it was against the spirit of Rule 285B Apart from this as averred in para 14 of the petition the circle rate was Rs 8000/- and the value of land according to it will come to Rs 10840/ In the counter affidavit the circle rate has not been specifically denied Therefore, clearly enough it is grossly inadequate in our opinion The auction of large area of 1355 acres of land limits the number of bidders In

the instant case there were only few bidders in the auction If the land would have been auctioned in more lots in our opinion it would have fetched substantially more price Therefore in our opinion auctioning the whole land in one lot besides being an illegality has also resulted in material irregularity in the conduct of sale Clearly enough if the sale would have been conducted in a proper manner it would have brought much more sale money In case of sale by lots it was also likely that whole land might not have been needed to be sold to meet the liability Therefore in our opinion, the material irregularity has resulted in substantial injury to the petitioner and the auction is bad on this ground also

23 It was further contended that the further proceedings of realisation of the money had been stayed by the Finance Minister by an order dated 6th February 1981 (Annexure 3) to the writ petition such auction could have not been held It is not necessary to consider this aspect in view of the discussion on other points

24 In the result the writ petition is allowed The impugned auction dated 24th February 1981 is quashed However the respondents Nos 1 to 5 are free to further proceed in the matter in accordance with law In the circumstances of the case we make no order as to costs

Petition allowed

1991 ALL. L. J 888

R R K TRIVEDI J

Sultan Singh Applicant v Deputy Director Consolidation Meerut and others Opposite Parties

C M W P No 856 of 1973 D/ 16 5 1991

W P Consolidation of Holdings Act (5 of 1954), S 48 — Revisional court — Is final court on questions of law and fact — Determination of shares — Assistant Director of consolidation has to consider the entire material on record of subordinate authorities including the oral evidence before reversing order in revision

(Para 8)

Cases Referred	**Chronological Paras**
1974 Unreported Revenue Cases 615	6
1974 Unreported Revenue Cases 635	6

Mr N S Singhal and Mr Sankatha Rai, for Applicant Standing Counsel Mr A D Prabhakar for Opposite Parties

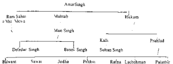
ORDER — This writ petition has been filed for quashing the order dated 18 10 1972 passed by Assistant Director of Consolidation, U P Lucknow in Revision No 44 Beni Singh v Sultan Singh and others and Revision No 269 Ratna and others v Jodha and others under Section 48 of the U P Consolidation of Holdings Act By this order Assistant Director of Consolidation U P Lucknow (Camp Meerut) determined the shares of the parties and also held that petitioner has 1/6th share in the land in dispute

2 The dispute between the parties in this writ petition is confined to shares in Khata No 94 of Khatauni of 1376 to 78F of village Sukhdeopur Pargane Dasana Tehsil and District Ghaziabad

3 In basic year aforesaid Khata No 94 was recorded in names of Jodha Prithvi, Balwant Sawai Ratna Lachchman and Palatbir sons of Prahlad, Sultan son of Kalli, Defedar and Benni Singh, sons of Man Singh Pedigree relevant for understanding the dispute between the parties is being given below which is not in dispute now

(see on next page)

4 Various objections were filed under Section 9 of U P Consolidation of Holdings Act (hereinafter referred to as the Act) claiming right and share in the land recorded in Khata No 94 The consolidation officer struck three issues Issue No 3 was regarding shares of the parties Consolidation Officer by his order dated 22 8 1971 recorded a finding



that it is not proved that who died first amongst Ram Sahai Hukum and Mahtab hence after death of Ram Sahai the rest two branches of Hukum and Mahtab will usually inherit the share of Ram Sahai equally On the basis of this finding Consolidation Officer determined that Defedar and Banni Singh will get jointly half share Share of Sultan Singh petitioner was determined as 1/4th and rest of the recorded tenure holders, namely, sons of Prahlad were to get equally in 1/4th share belonging to their father Against this order four appeals were filed. Appeal No 16 of Sultan Singh and Appeals Nos 232 and 1214 were against the order of the Consolidation Officer dated 22 8 1971 while Appeal No 214 was against the order of Consolidation Officer dated 28-10-1971 Assistant Settlement Officer of Consolidation by his order dated 1 12 1971 decided all the four appeals. Appeals No 214 and 232 were dismissed and Appeals Nos 16 and 1214 were allowed and the order of the consolidation officer dated 22-8 1971 was modified regarding shares which is only relevant for this writ petition By this order, share of petitioner Sultan Singh was determined 1/3rd, shares of Banni Singh and Defedar were determined 1/6 each and shares of Jodha, Balwant and Prithvi were determined 1/9 each The Assistant Settlement Officer of Consolidation formulated points for deciding the appeals Point No 4 related to share of Smt Mewa, widow of Ram Sahai, as to which branch inherited the same after death of Smt Mewa While deciding point No 4 the Assistant Settlement Officer of Consolidation on basis of the entries in Khatauni of 1303 F and in 1337F determined that Mahtab had already died during life time of Smt Mewa As entered in 1303 F Smt Mewa with one share Hukum Singh with one share and Man Singh with one share were recorded as co tenants. In Khatauni of 1337F however, only three persons, namely Prahlad, son of Hukum Singh Sultan Singh, son of Kalli and Man Singh son of Mahtab were recorded From this Khatauni of 1337F it was clear that by that time Smt Mewa and Hukum Singh, both had died The Assistant Settlement Officer of Consolidation after considering the statements of the witnesses Banni Singh Balwant Singh and Ratan Singh recorded a finding that Hukum grand father of the petitioner survived Smt Mewa On this finding the appeal of petitioner Sultan Singh was allowed and his share determined as 1/3rd It was accepted that as at the time of death of Smt. Mewa. Hukum Singh was alive, therefore share of Hukum Singh would be inherited only by Kalli and Prahlad on death of Hukum Singh and in this way the share of Sultan Singh was found to be 1/3rd in the Khata in dispute

5 The order dated 1 12 1971 passed by the Assistant Settlement Officer of Consolidation was challenged in revision by

Banni Singh and Ratna etc as mentioned above The Assistant Director of Consolidation allowed Revision No 44 filed by Banni Singh and another and dismissed the revision filed by Ratna etc by his order dated 18 10 1972 By this order the Assistant Director of Consolidation determined the share of petitioner as 1/6th and share of the branch of Man Singh as 1/2 and the share of the Branch of Prahlad as 1/3 Aggrieved by the aforesaid order dated 18 10 1972 the petitioner has filed the present writ petition

6 I have heard Shri Sankatha Rai learned counsel for petitioner and Shri A D Prabhakar learned counsel for the respondents and perused the record. Shri Sankatha Rai has challenged the order of the Assistant Director of Consolidation mainly on the ground that as the order of the appellate authority was being reversed, it was obligatory on the respondent No 1 to consider the findings and evidence on which basis the findings were recorded Shri Sankatha Rai stated that the order of the revisional court is illegal and arbitrary and without any basis as he proceeded on assumption that from the Khataunı of 1337F it cannot be inferred that share of Smt Mewa was inherited by petitioner and he assumed that share was inherited only by Man Singh and Prahlad who were preferential heirs Shri Sankatha Rai also placed reliance on the case Paras Nath v Wajiul Hassan reported in 1974 Unreported Revenue Cases page 615(DB) and the case Ram Kishan v Dy Director of Consolidation reported in 1974 Unreported Revenue Cases 655 (DB) for the proposition that under Section 48, Dy Director of Consolidation being the final court must consider the oral evidence and while reversing the findings of fact under Section 48 of the Act, it is the duty of the Dy Director of Consolidation to consider all the facts and circumstances which were discussed by the Settlement Officer of Consolidation If the Dy Director of Consolidation failed to consider the evidence relied on by the Settlement Officer of Consolidation his order cannot be sustained and has to be quashed

7 Shri A D Prabhakar on the other hand supported the order passed by respondent No 1 and submitted that the order does not suffer from any error of law and it has been passed after considering documentary evidence on record Shri Prabhakar invited my attention towards the copies of the statements of Banni Singh and Sultan Singh, Annexures III and IV to the supplementary affidavit, filed by the petitioner and on the basis of these statements Shri Prabhakar submitted that both these documents have been filed by the petitioner and a perusal of these statements shows that they did not say a word about death of Smt Oewa and Hukum Singh

8 I have thoroughly considered the rival contentions advanced by learned counsel for the parties and in my opinion the order of the Assistant Director of Consolidation dated 18-10 1972 suffers from manifest error of law for the reason that he failed to consider the oral evidence relied on by the Assistant Settlement Officer of Consolidation for recording finding that Hukum Singh was alive and he died after Smt Oewa On this finding Assistant Settlement Officer of Consolidation determined shares of the parties and share of the petitioner As the Assistant Director of Consolidation reversed the order of Assistant Settlement Officer of Consolidation so far as the determination of the shares was concerned it was obligatory on him to consider oral evidence relied on by the Assistant Settlement Officer of Consolidation The principles laid down by the aforesaid two Division Bench cases of this Court are squarely applicable in the present case Contention of Shri Prabhakar based on the statements filed as Annexures III and IV to the supplementary affidavit cannot be accepted for two reasons The first reason is that if there was no statement on record as mentioned by the Assistant Settlement Officer of Consolidation in his judgment the Assistant Director of Consolidation could very well ignore the finding on this ground Secondly, in the counter affidavit filed by respondents

it has not been denied any where that the statements of Banni Singh Balwant Singh and Ratan Singh mentioned and relied on by Assistant Settlement Officer of Consolidation were not on record The petitioner in his writ petition has assailed the order of the Assistant Director of Consolidation mainly on the ground that he has not considered the findings recorded by the Assistant Settlement Officer of Consolidation It appears that as there were two cases before the Consolidation Officer which were decided on 22 8 1971 and 28 10-1971 the statements recorded in the case where the dispute was regarding adoption have been inadvertently filed So far as shares of the parties are concerned, statements of the witnesses must have been recorded in other case The learned counsel for the petitioner realising his mistake prayed for an opportunity to file certified copies of the statements of the witnesses relied on by the Assistant Settlement Officer of Consolidation However as this writ petition is pending since 1973 in this Court in my opinion it will not be proper to delay the decision in this case further The error in the order of the Asstt. Director of Consolidation is apparent as he failed to consider findings recorded by the Assistant Settlement Officer of Consolidation and failed to record any reason for not accepting or not considering the oral evidence relied on by the Assistant Settlement Officer of Consolidation For this the revisional court under S 48 of the U P C H Act is the last court on questions of law and fact and it was obligatory on the revisional court to consider the entire material on record before reversing the orders of the subordinate authorities

9 For the reasons recorded above the order passed by the respondent No 1 dated 18 10 1972 in Revision No 44 -- Banni Singh versus Sultan Singh and others cannot be sustained and is liable to be quashed

10 The writ petition is thus allowed. The impugned order dated 18-10-1972 passed in Revision No 44 Banni Singh versus Sultan Singh and others, Annexure 'C' to the writ petition is hereby quashed Respondent No 1 is directed to treat the revision as pending before him on its original number and decide the same afresh after hearing parties on merits in accordance with law There will be no order as to costs

Petition allowed

1991 ALL. L. J 891

B P JGEVAN RGDD½ C J AND
S R SINGH J

Jogendra Singh Petitioner v State Bank of India Oainpuri and another Respondents

Civil Misc Writ No 5294 of 1985 D 14 5 1991

(A) Constitution of India, Art 246 — Competency of State Legislature to legislate — Determination — Ascertainment therefore, of entry to which enactment relates — Doctrine of pith and substance has to be employed — Enactment relating to entry in List 2 — On application of doctrine — Incidental trenching on field reserved for Parliament by List 1 of Sch 7 — Enactment does not become incompetent

While examining to which Entry does an enactment relate it is necessary to examine the pith and substance of the enactment What is to be ascertained is what is the central theme of the enactment It may happen that an enactment made by the State Legislature and which applying the doctrine of pith and substance is found relatable to an Entry in List II, may incidentally trench upon the field reserved for Parliament by List I, but on that account the said enactment cannot be declared as incompetent (Para 9)

(B) W P Agricultural Credit Act (19 of 1973), S 11 — S 11 is intra vires State Legislature — Act is one relating to agriculture as also to land and relief of agricultural indebtedness — Same is relatable to entries 14, 18 and 20 of List 2 of Sch 7 of

Constitution and perhaps to Entry 20 in List 3 — Definitely not relatable to Entry 45 in List 1, i.e., 'Banking

Constitution of India, Art 246, Sch 7, List 1, Entry 45, List 2, Entries 14, 18 and 20, List 3, Entry 20

The main object underlying the enactment is to provide for agricultural credit through banks and also to provide for its recovery To induce the banks to provide credit to agriculturists for agricultural purposes it was also necessary to provide an easy and convenient method for their recovery If the banks were asked to advance credit and in case it was not repaid, they were to file suit in civil court, which drags on for years and years the banks would not have come forward or agreed to advance credit to agriculturists S 11 providing for convenient method of recovery of loans is, thus an integral part of the scheme contained in the enactment It is perfectly within the competence of the State Legislature since it is clearly relatable to Entries in the State List and cannot by any stretch of imagination be relatable to Entry 45 of List I Banking The central theme of the enactment is not to regulate banking or to make a law relating to banks. It is a law relating to agriculture as also to land and relief of agriculture indebtedness It is thus relatable to Entries 14 18 and 30 of List II. It may also be relatable perhaps to Entry 20 in List III (Concurrent List) as a measure of economic and social planning But by no stretch of imagination can it be treated as a law relating to Banking'

(Para 10)

Cases Referred Chronological	**Paras**
CIR 1981 Madras 318	2 4
1980 All NJ 950 AKR 1980 SC 1955	9
AKR 1978 SC 215 (1978) 1 SCR 641	9
AIR 1976 SC 1031 (1976) 1 SCR 552	9
1972 Vax 4R 449 CIR 1972 SC 1061	9

H O Srivastava, for Petitioner S C, for Respondents

JEEVAN REDDY, C J — The Uttar Pradesh Legislature enacted U P Agricultural Credit Act 1973 to make provisions to facilitate adequate flow of credit for agricultural production and development through banks and other institutional credit agencies and for matters connected therewith or incidental thereto It was brought into force with effect from 1 1 1974 S 2 of the Act defines certain expressions S 3 empowers the State Government to vest, subject to such restrictions as may be specified in the notification, all bhumidhars, asamis and Government lessees with rights of alienation in land (held under their tenure or any interest held by them in such land) including the right to create a charge or mortgage on such land or interest in favour of banks for the purpose of obtaining financial assistance S 6 provides that an agriculturist desirous of securing financial assistance from any bank by creating a charge on land or any immovable property may make a declaration on a duly stamped paper in the form set out in the schedule to the Act Chapter IV of the Act provides for recovery of dues by banks S 11, in particular, provides that notwithstanding anything contained in any law for the time being in force an officer specified by the State Government may on an application by the bank, by order direct that any amount due to the bank on account of financial assistance given to agriculturists be recovered by sale of the land or of any interest therein or other immovable property which is charged or mortgaged towards the loan amount It is not necessary for us to go into other provisions in as much as we are concerned in this writ petition only with the validity of S 11 For the sake of convenience S 11 may be set out in its entirety It reads —

11 Recovery of dues of a Bank through a prescribed authority — (1) Notwithstanding anything contained in any law for the time being in force an officer specified by the State Government by notification in the Gazette (hereinafter referred to as the prescribed authority) may, on the application of a bank by order direct that any amount due to the bank on account of financial assistance given to an agriculturist be paid by the sale of the land or any interest therein or

other immovable property which is charged or mortgaged for the payment of such amount

Provided that no order of sale shall be made under this sub-section unless the agriculturist has been served with a notice by the prescribed authority calling upon him to pay the amount due

(1A) The provisions of the Limitation Act 1963 shall apply in relation to an application under sub-section (1) as if such application were a suit in civil court for sale of the land or interest therein or other immovable property for enforcing recovery of the sum referred to in that sub-section

(2) An order passed by the prescribed authority shall subject to the result of appeal under S 12 be final and be binding on the parties

(3) Every order passed by the prescribed authority in terms of sub-section (1) or by the appellate authority under S 12 shall be deemed to be a decree of civil court and shall be executed in the same manner as a decree of such court having jurisdiction

(4) No suit for the recovery of any sum due to a bank on account of financial assistance given to an agriculturist shall lie in the civil court"

2 The learned counsel for the petitioner Sri H O Srivastava raised a legal contention at the hearing of the writ petition, though not taken in the writ petition He submitted, on the basis of a decision of the Oadras High Court in G N Venkataswamy v Tamil Nadu Small Industries Corporation Ltd and others AIR 1981 Oadras 318 that S 11 is ultra vires the State Legislature and hence no recovery can be made in accordance with S 11 Before we proceed to deal with this contention it would be appropriate to briefly state the facts of the writ petition

3 The petitioner is an agriculturist He took a loan from the first respondent, State Bank of India Mainpuri, in the sum of Rs. 65,000/- in the year 1981, for purchasing a tractor The loan was repayable in certain specified instalments within a period of seven years The petitioner says that he paid certain amount But admittedly he did not pay the instalments as stipulated, whereupon the bank sent a recovery certificate to the second respondent Tahsildar Bhongaon District Oainpuri to recover an amount of Rs 1 18 611 80 p plus interest and collection charges On the basis of the said certificate, the Tahsildar proceeded to recover the amount as arrears of land revenue It is against these recovery proceedings that the present writ petition was filed The recovery proceedings were stayed by this Court by an order dated 17 3-1988 on the condition of the petitioner depositing a sum of Rs 25 000/- within two weeks from the date of the order

4 The contention of the learned counsel is that a law relating to banking can be made only by the Parliament in as much as banking is one of the subjects in the Union List (List I) of the Seventh Schedule to the Constitution The State Legislature has no power to make a law relating to banking S 11 of the U P Act is a law relating to banking in as much as it provides for and deals with recovery and mode of recovery of the debts due to banks Strong reliance is placed upon the Bench Judgment of the Oadras High Court in G N Venkataswamy (supra) wherein S 52A of the Tamil Nadu Revenue Recovery Act was declared as ultra vires the powers of the State Legislature

5 For a proper appreciation of this contention, it is necessary to notice a few Entries in the Seventh Schedule to the Constitution

6 Entry 45 of List I (Union List) reads, 45 Banking

7 Entry 14 of List II (State List) reads, 14 Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases " Entry 18 of List II reads, 18 Land, that is to say, rights in or over land land tenures including the relation of landlord and tenant, and the collection of rents transfer and

alienation of agricultural land land improvement and agricultural loans colonization Entry 30 in List II relates to relief of agricultural indebtedness It reads 30 Money lending and money lenders relief of indebtedness Entry 45 of List II pertains to land revenue It reads 45 Land revenue including the assessment and collection of revenue the maintenance of land records, survey for revenue purposes and records of rights and alienation of revenues

8 Entry 20 of List III (Concurrent List) reads 20 Economic and social planning Entry 33 of List III which was substituted by the Constitution (Third Amendment) Act, 1954 reads 33 Trade and commerce in and the production supply and distribution of —

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest and imported goods of the same kind as such products,

(b) food stuffs including edible oilseeds and oils

(c) Cattle fodder including oilcakes and other concentrates.

(d) raw cotton whether ginned or unginned, and cotton seed and

(e) raw jute

9 It is well settled that while examining to which Entry does an enactment relate, it is necessary to examine the pith and substance of the enactment We have to ascertain what is the central theme of the enactment It may happen that an enactment made by the State Legislature and which applying the doctrine of pith and substance is found relatable to an Entry in List II may incidentally trench upon the field reserved for Parliament by List I but on that account, the said enactment cannot be declared as incompetent While it is unnecessary to refer to the several decisions on the subject, it would be enough if we refer to the decision of the Constitution Bench of the Supreme Court in Ishwari Khetan Sugar Mills v State of U P AIR 1980 SC 1955 (1980 All LJ 950) It says at Page 1964 —

12 When validity of a legislation is challenged on the ground of want of legislative competence and it becomes necessary to ascertain to which entry in the three lists the legislation is referable to the Court has evolved the theory of pith and substance If the pith and substance of a legislation falls within one entry or the other but some portion of the subject matter of the legislation incidentally trenches upon and might enter a field under another List the Act as a whole would be valid notwithstanding such incidental trenching This is well established by a catena of decisions (see Union of India v H S Dhillon (1972) 2 SCR 33 AIR 1972 SC 1061 (1972 Tax LR 449) and Kerala State Electricity Board v Indian Aluminium Co Ltd (1976) 1 SCR 552 AIR 1976 SC 1031 After referring to these decisions in State of Karnataka v Ranganatha Reddy (1978) 1 SCR 641 AIR 1978 SC 215 Untwalia, J speaking for the Constitution Bench has in terms stated that the pith and substance of the Act has to be looked into and an incidental trespass would not invalidate the law The challenge in that case was to the nationalisation of contract carriages by the Karnataka State inter alia on the ground that the statute was invalid as it was a legislation on the subject of inter State trade and commerce Repelling this contention the Court unanimously held that in pith and substance the impugned legislation was for acquisition of contract carriages and not an Act which deals with inter State trade and commerce

10 Bearing the said principle in mind, let us examine whether the U P Agricultural Credit Act is outside the competence of the Legislature of Uttar Pradesh. We have already referred to the purpose for which the said enactment was made The main purpose was to enable the agriculturists to create a charge upon their lands or to mortgage them in favour of banks for raising loans for developing their agriculture For this purpose a right was

created in the several tenure-holders to charge or mortgage their lands in favour of banks a simple and convenient procedure was also evolved for the said purpose The main idea was to save the agriculturists from the clutches of unscrupulous money lenders who have been grabbing their lands under the guise of recovery of loans and to provide for a steady flow of agricultural credit through banks Interest charged by banks is far lower than interest charged by money lenders and there is always an openness in all dealings with banks As part of the scheme the Act also provides for recovery of loans given by banks to agriculturists for agricultural purposes S 2 defines the expressions agriculture agricultural purpose and agriculturist The Act also provides for financing of agricultural co operative credit societies by banks with the same object Can it be said that this is a law relating to Banking ? We think not The central theme of the enactment is not to regulate banking or to make a law relating to banks It is a law relating to agriculture as also to land and relief of agriculture indebtedness It is thus relatable to Entries 14 18 and 30 of List KI It may also be relatable perhaps, to Entry 20 in List III (Concurrent List) as a measure of economic and social planning But by no stretch of imagination can it be treated as a law relating to Banking ' No doubt the Act provides for recovery of loans advanced by banks But it does not deal with recovery of all loans given by banks It only provides for recovery of agricultural loans advanced by banks to agriculturists To reiterate the main object underlying the enactment is to provide for agricultural credit through banks and also to provide for its recovery To induce the banks to provide credit to agriculturists for agricultural purposes it was also necessary to provide an easy and convenient method for their recovery If the banks were asked to advance credit and in case it was not repaid they were to file suit in civil court, which drags on for years and years the banks would not have come forward or agreed to advance credit to agriculturists S 11 is thus an integral part of the scheme contained in the enactment It is perfectly within the competence of the State Legislature since it is clearly relatable to Entries in the State List and cannot by any stretch of imagination be relatable to Entry 45 of List I Banking

11 We shall now examine the decision of the Oadras High Court upon which strong reliance is placed by the learned Counsel for the petitioner S 52A of the Tamil Nadu Revenue Recovery Act provided for recovery of loans and advances to any person (i) by Tamil Nadu Agro Industries Corporation Ltd. Madras or (ii) by such other Corporations (the shares of which have been contributed, under written or guaranteed by the State Government) as may be notified in this behalf by the State Government in the Tamil Nadu Government Gazette as arrears of land revenue It would be appropriate to set out the said provision It reads

52A Recovery of sums due to the Tamil Nadu Agro Industries Corporation and other Corporations etc — Without prejudice to any other mode of recovery which is being taken or may be taken All loans granted and all advances made to any person —

(i) by the Tamil Nadu Agro Industries Corporation Limited, Oadras or

(ii) by such other Corporations (the shares of which have been contributed, under written or guaranteed by the State Government) as may be notified in this behalf by the State Government in the Tamil Nadu Government Gazette or

(iii) from out of the Amalgamated Tamil Nadu shares of the Post War Services Reconstruction Fund and the Special Fund for Reconstruction and Rehabilitation of Ex-servicement together with interest on such loans and advances and all sums due to the Corporations mentioned in clauses (i) and (ii) may be recovered in the same manner as arrears of land revenue under the provisions of this Act

It appears that the Govemoent of Tamil Nadu had from time to time issued notifications notifying the Corporations such as the State

Industries promotion Corporation of Tamil Nadu Ltd the Tamil Nadu Small Industries Development Corporation Ltd The Tamil Nadu Industrial Investment Corporation Ltd and so on as Corporations within the meaning of S 52A The petitioner before the Madras High Court had taken a loan from Tamil Nadu Small Industries Development Corporation Ltd which he failed to repay whereupon proceedings were taken under S 52A for recovering the same as arrears of land revenue The petitioner approached the Madras High Court by way of a writ petition questioning the validity of the said provision on the ground that it is outside the competence of the Madras Legislature to enact The petitioner s contention was that S 52A is not relatable to any of the Entries in List II or List III and, therefore outside the province of the State Legislature According to the petitioner, the said provision was relatable, to Entry 45 in List I The respondent Corporation however, sought to relate the said provision to Entries 3 43 and 45 of List II of the Seventh Schedule Entries 3 43 and 45 of List II read as follow —

3 Officers and servants of the High Court procedure in rent and revenue courts Fees taken in all courts except the Supreme Court

43 Public debt of the State

"45 Land revenue including the assessment and collection of revenue the maintenance of land records survey for revenue purposes and records of rights and alienation of revenues

The Division Bench examined the three Entries and held that the impugned provision cannot be related to any of them The Bench confined its attention to S 52A and held that it cannot be related to any of the three entries in the List II relied upon for the Corporation The conclusion of the Bench is to be found in paragraph 46 of its judgment It runs as follows —

46 the conclusion is inescapable that Entry 45 of List II of the Seventh Schedule to the Constitution of India only deals with land revenue payable to the State and it has nothing whatever to do with any amount payable by any person to anybody else Therefore prima facie the State Legislature, under the said Entry will have no power to enact a law for the purpose of collecting the dues owned by a person to a Corporation like the Corporations with which we are concerned and from this point of view S 52A of the Act as introduced by the Tamil Nadu Act 12 of 1972 will be outside the legislative competence of the State "

It is indeed not necessary for us to express any opinion on the correctness or otherwise of the said decision for the reason that the Madras High Court was not dealing with either agricultural credit or with relief of agricultural indebtedness, where as the Uttar Pradesh Act in question deals exclusively with flow of agricultural credit through banks and recovery of loans advanced by banks for agricultural purposes It does not also appear that the attention of the Madras High Court was invited to Entry 20 in the Concurrent List, which relates to economic and social planning S 52A of the Tamil Nadu Act was sought to be justified as a law relating to Entries 3, 43 and 45 of the State List and particularly with reference to Entry 45 which deals with land revenue including assessment and collection of land revenue The Court held that it cannot be so related It is evident that the U P Act is by its very character, theme and purpose wholly distinguishable and different from the provision of the Tamil Nadu Revenue Recovery Act considered by the Madras High Court The said decision has, therefore no application to the U P Act or S 11 thereof

For the above reasons we reject the contention that S 11 of the U P Agricultural Credit Act 1973 is ultra vires the Legislature of Uttar Pradesh

12 No other point was urged except a plea for facility of payment The bank too has no objection to fixation of appropriate instalments Accordingly we direct that the entire amount due and payable as on 1 6

1991 shall be paid in four equal quarterly instalments commencing with 1 6 1991 The first instalment shall be payable on or before 1 6 1991 and the remaining three on 1 9 1991 1 12 1991 and 1 3 1991 respectively If any one of these instalments is not paid as specified herein the entire amount shall become payable at once and can be recovered in accordance with law

13 It shall be open to the petitioner to approach the Bank for furnishing him with a statement of accounts as on 1 6 1991 He may approach the Bank for this purpose within three weeks from today and if he does so the Bank shall furnish a statement of him within two weeks therefrom

14 The writ petition is accordingly dismissed subject to fixation of the instalments in the foregoing paragraph by us There shall be no order as to costs

Petition dismissed

1991 ALL L J 897

M L BHAT J

Syed Ahmed Ali and others Appellants v Shafiq Ahmad Respondents

Second Appeal No 2898 of 1987 D/ 16 5 1991 *

(A) Evidence Act (1 of 1872), S 91 — Documentary evidence — Lease deed, not registered — Cannot be taken as evidence and relied upon by Court, in eviction proceedings

Registration Act (16 of 1908), Ss 17, 49

(Paras 12, 13)

(B) U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S 20 — Eviction suit — Open land taken on lease for commercial purpose — Temporary shed constructed thereon by lessee without permission of landlord — Provisions of U P Act 13 of 1972 would not be attracted in eviction proceedings

Transfer of Property Act (4 of 1882) Ss 106, 111

A building which could be brought under the purview of the U P Urban Buildings (Regulation of Letting Rent and Eviction) Act 1972 must be residential or non residential and a rooted structure which would include land including any garden garrage and out houses appurtenant to such building Therefore the open land which had been taken on lease cannot be said to be a building and even though a temporary shed was constructed thereon by lessee without permission of landlord it would not change the nature of the land into a building so as to attract the provisions of the U P Act No 13 of 1972 in the eviction proceedings and a suit under the Transfer of Property Act could be brought against the lessee Consequently it cannot be said that cognizance of suit by the Trial Court would be barred and the suit should be tried under the provisions of Small Cause Courts Act The Trial Court would have jurisdiction to try and decide the suit

(Paras 14 to 16)

Cases Referred	**Chronological**	**Paras**
(1987) 2 All RC 461		12
(1987) 2 All RC 506	1986 All WC 167	12
AIR 1984 SC 143	(1984) 1 All RC 515	12
AIR 1983 All 164	(1983) 1 All RC 422	12

Sri V K Gupta Sri A K Gupta for Appellant Sri R G Padia for Respondent

JUDGMENT — This second appeal is filed by the plaintiffs against the judgment and decree of IX Additional District Judge Allahabad dated 16-8 1987 By the impugned judgment the first appellate court while setting aside the judgment and decree of the Munsif dated 23 3 1984 dismissed the plaintiff's suit against the defendant for ejectment

2 The following are substantial questions of law on which this appeal is to be decided

(i) Whether the agreement dated 31 10-1978 being unregistered and against the provisions of Ss 11 and 13 of the Act was void and could be looked in evidence ?

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*Against the decree & Judgment passed by Sri U C Dixit, IXth Addl Dist J Allahabad D/ 19 8 1987

(iii) Whether the small Kothari with a huge open land could bring the entire tenanted portion under the definition of building within the provisions of the U P Act No 13 of 1972 "

3 For determination of the aforesaid questions it is necessary to deal briefly with the facts The appellants filed a suit against the respondent defendant alleging that the defendant was a tenant on monthly rent of Rs 200/ The property was let out for business purpose However there was no roofed structure in the property in dispute A temporary structure measuring 10' x 6' was raised by the defendant in a small portion of the land in dispute without the permission of the appellants It was contended that the provisions of the Rent Control Act of 1972 did not apply to the property in dispute The tenancy was terminated by a valid notice under S 106 of the Transfer of Property Act dated 21 1 1983 which was served on the defendant on 4 2-1983 The respondent is said to have not vacated at the period of the expiry of the notice The rent was also claimed from the respondent with effect from 1 11 1982 The amount of Rs 821/ was also claimed from the defendant on account of arrears of rent Pendente lite damage as also damage for future were also claimed from the defendant

4 The defendant seems to have contested the suit He seems to have contended that the property in dispute originally belong to Sri Wajid Ali, grand father of plaintiffs Nos 1 and 2 who had raised construction on plot No 72/82, which was given a separate municipal number 132 and splitted into two numbers 204 and 205 According to the defendant he was a tenant of the entire premises covered by plot No 204 but a portion of it was allowed to be occupied by the plaintiffs and the defendant retained a northern part of plot No 204 and an agreement dated 31 10 1978 between the parties was also executed The said Wajid Ali is said to have created a Waqf Alal Aulad of the property Plaintiff 1 is said to be Mutwalli and landlord of the defendant Plaintiffs Nos 2 and 3 are not the landlord However, plaintiff No 2 joined the agreement dated 31 10-1978 It is stated that the building with land was let out Therefore the suit was covered by the Rent Control Act of 1972 The agreement dated 31 10 1978 was relied upon In the said agreement the intention of the parties it is stated was that the defendant would not be ejected from the tenament unless he rendered himself liable to ejectment on any of the grounds specified in S 20 of the U P Act No 13 of 1972 Whether or not the U P Act No 13 of 1972 would apply to the suit but the defendant could be ejected only on the grounds similar or analogous to the grounds contained to S 20 of the U P Act No 13 of 1072 The land mentioned in the agreement was treated as attached to the building for the beneficial enjoyment of the building which was let out to the defendant It was further contended that the property being waqf property the plaintiffs had no right to sue and maintain the suit Arrears of rent had accoumulated because of wrong refusal of the money order by the plaintiff No 1 The trial court framed certain issues in the suit Issue No 1 related to the plaintiffs title as landlord over the suit property Issue No 2 related to the application of the W P Act No 13 of 1972 to the suit Issue No 3 was about the plaintiff having no right to sue Issue No 4 related to the validity of the notice

5 About issue No 1 the trial court had found that the plaintiffs were not the owners of the property but plaintiff No 1 was mutwally of the waqf property while the remaining plaintiffs were beneficiaries It was held that the W P Act No 13 of 1972 was applicable to the suit The suit was held to be maintainable against the defendant and the notice was held to be valid Arrears of rent were refused but damages for use and occupation during the pendency of the suit and in future were granted at the rate of Rs 200/ per month

6 Before the first appellate court the learned counsel for the parties appear to have argued whether the suit was governed by the provisions of the W P Act No 13 of 1972 If the said Act was applicable, the suit by the

landlord against the tenant for eviction from the building after determination of tenancy is cognizable by the Small Cause Court It defines building to mean a residential or non residential roofed structure which includes any land garden garrage or out house appurtenant to such a building

7 Building is defined in the U P Act No 13 of 1972 also It says that building means a residential or non residential roofed structure and includes (i) any land (excluding any garden) garrage and out houses appurtenant to such building (ii) any furniture supplied by the landlord for use in such building (iii) any fittings and fixtures affixed to such building for more beneficial enjoyment thereof

8 The first appellate court seems to have relied upon the agreement dated 31-10-1978 which according to the appellants is not admissible in evidence and is not a valid document It relied on the agreement for the following facts

9 The property in the tenancy of the defendant had been described as a house It is further provided that over the said property constructions are in existence and the land is attached to these constructions as Saban which is a part of the house As such the U P Act No 13 of 1972 is applicable Southern part of the property which is shown a separate portion and marked by certain letters will be used by the plaintiffs and will not be let out to any other person The parties were left free to conduct any business of their choice on their respective tenaments Rs 200/ will be paid as rent by the defendant and the plaintiffs had agreed that the U P Act No 13 of 1972 will apply to the tenaments Any suit for ejectment could be brought under the U P Act No 13 of 1972 The defendant was given a right to construct any temporary shed House tax was the responsibility of the plaintiffs

10 Two substantial questions on which this second appeal was admitted relate to the validity of the agreement and whether the tenanted premises could be said to be building within the meaning of the U P Act No 13 of 1972 so as to attract the provisions of the said Act

11 I have heard the learned counsel for the parties and gone through the record

12 The deed of agreement on which the first appellate court has relied on is admittedly an unregistered document An unregistered document when it confers limits and extinguishes title in any person in the immovable property the said document has to be compulsorily registered and if it is not registered, it cannot be received in evidence It may, however, be looked into for collateral purposes It was contended by the learned counsel for the appellants that the deed of agreement being unregistered was not admissible in evidence Therefore the first appellate court was not correct in having relied on the contents of the unregistered document for the purposes of decision of the appeal Some authorities on this question was cited at the Bar In Zarif Ahmad and another v Satish Kumar and another reported in (1983) 1 All RC 422 (AIR 1983 All 164) it was held that the lease deed in respect of immovable property for a period of less than a year, if made in writing must be registered under S 107 In Satish Chand Oakhan and others v Goverdhan Das Byas and others reported in (1984) 1 All RC 515 (AIR 1984 SC 143) the Supreme Court was of the view that unregistered lease deed is inadmissible in evidence for proving the nature of possession also The terms of the lease deed are not for collateral purposes Such agreement cannot be looked into In Budh Ram v Ralla Ram, reported in (1987) 2 All RC 461, the Supreme Court has held that the lease deed, registration whereof was compulsory, was not admissible in evidence In Jai Ram Agarwal v VI Addl District Judge Allahabad, reported in (1987) 2 All RC 506 it was held that unregistered lease deed cannot be recived in evidence The terms of the lease cannot explain the collateral purpose Therefore S 49 of the Registration Act also cannot make it admissible for collateral purpose

13 The deed of agreement and its various clauses indicate that some rights are

conferred some are extinguished and some others are created in favour of the parties Therefore the deed of agreement was compulsorily registerable under S 17 of the Registration Act It could not be received in evidence in the absence of its registration However it could be used for some collateral purpose The collateral purpose must be such purpose which is not related to the terms of the agreement The lease of agreement and its terms whereby it has created and limited the rights of the parties cannot be said to be capable of being used for the collateral purpose because the purpose for which it is sought to be used in the primary purpose of the document which is revealed from its contents The collateral purpose is a purpose which was connected with the main purpose The ingredients of the main purpose recited in the lease agreement cannot be said to be collateral to the controversy which is before the Court The terms and conditions of the lease for which the first appellate court has used the document cannot be said to be collateral purpose Therefore it cannot be received in evidence even under S 49 of the Registration Act That being so the lease agreement could not be looked into for any purpose whatsoever by the first appellate court nor could it be used for imposing any obligation on the parties to the document by virtue of its terms and conditions by the Court The parties may out of court choose to abide by the terms and conditions of the unregistered deed but that would not authorise the court to use unregistered deed in evidence so as to impose any liability or obligation on any of the parties to the lease unless the document is used for collateral purpose which purpose must be unconnected and unrelated to the main purpose of the document Therefore the first question to be determined as substantial question of law is to be answered in favour of the plaintiffs and the plaintiffs have not incurred any obligation under the terms of the unregistered deed because such a deed cannot be used against him by the court as it cannot be received in evidence The first appellate court, therefore was wrong in relying on the terms of the unregistered deed [illegible] for the defendant

14 The second substantial question will be whether the U P Act No 13 of 1972 was applicable to the premises or not From the record it appears that the defendant had taken a portion of the land for commercial purpose The defendant is dealing in Ballis The defendant had taken some land on lease and not the building as suggested by the first appellate court It is in evidence of the parties that a small temporary shed was constructed by the defendant on 10' x 6' of the disputed land and its construction does not seem to have been consented to by the appellants The open land which had been taken on lease cannot be said to be a building even though on small portion of the land a temporary shed was constructed A building which could be brought under the purview of the U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act 1972 must be residential or non residential and a roofed structure which would include land including any garden, garrage and out houses appurtenant to such building The defendant is doing his business on a vast piece of land and on a small portion of it if he has constructed a shed also, that would not change the nature of the land into a building so as to attract the provisions of the U P Act No 13 of 1972 The first appellate court has been influenced by the terms and conditions of the unregistered deed and, therefore, it has held the disputed property as building within the meaning of the U P Act No 13 of 1972 After excluding the unregistered lease deed as inadmissible, the other evidence which is on record would positively suggest that the property in question is not a building within the meaning of the U P Act No 13 of 1972 but is a land let out for commercial purpose That being so a suit under the Transfer of Property Act could be brought against the defendant respondent by the plaintiffs

15 The substantial question No 2 is also answered in favour of the appellants and it is held that the eviction proceedings in respect of the property in question would not be governed by the U P Act No 13 of 1972

16 The trial court had the jurisdiction to try and decide the suit The first appellate

court has wrongly assumed that the trial court s cognizance of the suit was barred because the suit was to be tried under the provisions of the Small Cause Courts Act and it would be governed by the U P Act No 13 of 1972

17 For the reasons stated above the second appeal is allowed, the judgment and decree of the first appellate Court dated 19 8-1987 is set aside and that of the trial court dated 23 3 1984 is restored There will be no order as to costs

Appeal allowed

1991 ALL L J 901

U C SRIVASTAVA AND
S N SAHAY JJ

Ghanshyam and others, Petitioners v Sub Divisional Officer, Salon and another Opposite Parties

W P No 968 of 1990 D/ 20-2 1990

U P Zamindari Abolition and Land Reforms Act (1 of 1951), S 3(4), S 198(4) — Cancellation of lease — Collector exercises power not as persona designata but as Revenue Court — Sub Divisional Officer has also jurisdiction to exercise powers of Collector

U P Land Revenue Act (3 of 1901), S 14

1985 All LJ 120, Overruled

The Collector exercises the power under Section 198(4) not as Persona Designata but as a Revenue Court and by virtue of the provisions contained in S 3(4), the Sub Divisional Officer has also jurisdiction to exercise the powers of the Collector under S 198(4) of the Act if he satisfies the conditions laid down in S 3(4)

(Para 6)

The power which has been conferred on the Collector under Section 198(4) is exercised by him as a Revenue Court and the same power can be exercised by the Sub Divisional Officer also In respect of matters concerning cancellation of lease granted under Section 198 the State Legislature did not proceed to constitute a new Court Tribunal or authority but conferred power under sub-section (4) thereof on the existing Revenue Court of Collector who could exercise the power under S 198(4) also by virtue of the provisions contained in S 14 of the U P Land Revenue Act without anything more Therefore it cannot be said that the Collector is a specially constituted Tribunal to adjudicate upon the legality or otherwise of a lease granted in favour of a person under Section 198 There is nothing to show in the Scheme of S 198 that the Collector has been selected to act under sub-section (4) of Section 198 in his private capacity or is referred to as an individual as opposed to a person ascertained as a member of a class or as a filling of particular character He is just an officer appointed by the State Government to be the Collector of the district under S 14 of the Land Revenue Act to exercise all the powers and discharge all the duties conferred and imposed on the Collector by this Act or any other law for the time being in force

1985 All LJ 120 Overruled

(Para 6)

Cases Referred Chronological	**Paras**
1985 All LJ 120 (Overruled)	2
1978 Cri LJ 1 AIR 1978 SC 1	3
1969 All LJ 19 AIR 1969 All 484 (FB)	3
1966 All NJ 1122 AIR 1966 SC 1888 1966 Cri LJ 1514	3
1961 All LJ 215 AIR 1961 SC 606 1961 (1) Cri LJ 740	3
AIR 1924 Madras 561 (FB)	3

Dr Ashok Verma for Petitioners

S N SAHAY, J. — This petition is directed against notice (Annexure 3) which has been issued to the petitioners in a case under Sections 33/39, U P Land Revenue Act 1901 The case of the petitioners is that Pattas were granted to the petitioners by the Land Management Committee in respect of certain plots situate in village Jairampur in the year 1975 The names of petitioners were mutated on the basis of the said Pattas and they were duly recorded as Bhumidhars with non transferable rights in the Khetauni After sometime proceedings for corrections of papers under Sections 33/39 of the said Act, were started and the impugned notices were issued to the petitioners to file objections if any The petitioners filed objections on 28 9 1989 It is stated that the cases have been submitted by the Naib Tahsildar Salon to Sub Divisional Officer, Salon Rae Bareli opposite party No 1, for orders and it is said that the Pattas granted in favour of the petitioners will be cancelled The petitioners have accordingly approached this court under Art 226 of the Constitution for quashing the impugned notices and for restraining the opposite party No 1 from proceedings with the cases pending against the petitioners under Sections 33/39 of the Act

2. The learned counsel for petitioners has contended that the jurisdiction to cancel the Pattas is vested in the Collector under Section 198(4) of the U P Zamindari Abolition & Land Reforms Act, 1950 and as the Collector is a Persona Designata, the opposite party No 1 has no jurisdiction to proceed with the cases under Sections 33/39 of the said Act In support of this contention, learned counsel has relied on the decision of a learned single Judge of this Court in Shiv Lal v Board of Revenue 1985 All LJ 120 It has been held that the power under S 198 in connection with the cancellation of the lease is to be exercised only by the Collector and not by the Sub Divisional Officer The Collector has been given power as Persona Designata, which obviously means that the he is a specially empowered Tribunal and is a person or authority specially constituted or empowered to entertain and adjudicate upon the particular type of litigation mentioned in Section 198(4) of the U P Zamindari Abolition & Land Reforms Act

3. The meaning of the expression 'Persona Designata' was considered and explained in Central Talkies v Dwarika Prasad, AIR 1961 SC 606 (1961 All LJ 215) The meaning given in Osborne 'Concise Law Dictionary and Parama Sardhi Naidu v Koterewara Rao, AIR 1924 Madras 561 (FB) was approved. A Persona Designata is a person who is a pointed out or described as an individual as opposed to a person ascertained as a member of a class or as filling of particular character Persons selected to act in their private capacity and not in their capacity as Judges are Persona Designata Thus the criterion for determining a Persona Designata is whether he has been selected to act as an individual or in his private capacity or as a member of class or as filling a particular character The law laid down in the above mentioned case has been followed in the latter decisions of the Supreme Court reported in Ram Chandra Agarwal v State of U P AIR 1966 SC 1888 (1966 All NJ 1122) and Thakur Das v State of Madhya Pradesh, AIR 1978 SC 1 (1978 Cri LJ 1) and also by a Full Bench of this Court in Maharaja Dharmendra Prasad Singh v State of U P AIR 1969 All 484 (1969 All LJ 19) (FB)

4 Section 198(4) of the U P Zamindari Abolition & Land Reforms Act, 1950 confers power on the Collector to cancel the allotment and lease in the circumstances mentioned therein The power to cancel the allotment and the lease May be exercised by the Collector of his own motion or on the application of any person aggrieved There is no provision for appointment of Collector in Section 198(4) of the said Act The definition of the word Collector' is contained in Section 3(4) of the Act According to that definition, which will aslo govern the cases under Section 198(4) also Collector means an officer appointed as Collector under the provisions of the U P Land Revenue Act, 1901 and includes an Assistant Collector of Ist Class empowered by the State Government by a Notification in the Gazette to discharge all or any of the functions of Collector under the Act

5 The Collector is appointed under Section 14 of the U P Nand Revenue Act, 1901 which provides that the State Government shall appoint in each District an officer who shall throughout his district exercise all the powers and discharge all the duties conferred and imposed on a Collector by this Act or any other law for the time being in force The Assistant Collector, whether of the Ist Class or IInd Class, is appointed under Section 15 and it is provided

in Section 18 that the State Government may place any Assistant Collector of the Ist Class incharge of one or more sub-divisions of a district and remove him therefrom Section 18(2) provides that such Assistant Collector shall be called Assistant Collector incharge of sub-division of a district or a Sub Divisional Officer and shall exercise all the powers and discharge all the duties conferred and imposed upon him by the Act and by any other law for the time being in force subject to the control of the Collector It may be mentioned that various revenue courts have been constituted under the U P Land Revenue Act and by virtue of Section 4(3) (S 3(4)) thereof Collector and Sub Divisional Officer, both are Revenue Courts

6 The combined effect of the provisions contained in the aforesaid enactments is that the power which has been conferred on the Collector under Section 198(4) is exercised by him as a Revenue Court and the same power can be exercised by the Sub-Divisional Officer also The State Legislature has power under Entry 65 read with Entries 18 and 45 of the State List in the Constitution to make law regarding jurisdiction and powers of all courts except the Supreme Court with respect to land, i e to say rights in or overland, land tenures and transfer and alienation of agricultural land as also land revenue including the maintenance of land records It has also power under Entry 11-A of the Government List to make law with respect to administration of justice and constitution and organisation of all court except the Supreme Court and the High Courts In respect of matters concerning cancellation of lease granted under Section 198 the State Legislature did not proceed to constitute a new Court, Tribunal or authority, but conferred power under sub-section (4) thereof on the existing Revenue Court of Collector, who could exercise the power under Section 198(4) also by virtue of the provisions contained in Section 14 of the U P Land Revenue Act without anything more Therefore, it cannot be said that the Collector is a specially constituted Tribunal to adjudicate upon the legality or otherwise of a lease granted in favour of a person under Section 198 There is nothing to show in the Scheme of Section 198 that the Collector has been selected to act under sub-section (4) of Section 198 in his private capacity or is referred to as an individual as opposite to a person ascertained as a memeber of a class or as a filling of particular character He is just an officer appointed by the State Government to be the Collector of the district under Section 14 of the Land Revenue Act to exercise all the powers and discharge all the duties conferred and imposed on the Collector by this Act or any other law for the time being in force Therefore in view of the provisions referred to above and the tests laid down by their Lordships of the Supreme Court in the cases mentioned above we are unable with due respect to share the views of the learned single Judge We have arrived at the conclusion that the Collector exercises the power under Section 198(4) not as Persona Designata but as a Revenue Court and by virtue of the provisions contained in Section 3(4) the Sub-Divisional Officer has also jurisdiction to exercise the powers of the Collector under Section 198(4) of the Act, if he satisfies the conditions laid down in Section 3(4)

7 It is stated in the writ petition that the opposite parties are bent upon cancellation the Pattas granted in favour of the petitioners We have no doubt that the cases under Sections 33/39, Land Revenue Act pending against the petitioners will be disposed of by the opposite parties in accordance with the law and if there is any occasion to exercise the jurisdiction under Section 198(4) of the U P Zamindari Abolition and Land Reforms Act it will be exercised by the appropriate authority strictly in accordance with the legal procedure and the requirements of law

8 The writ petition has no force and is accordingly dismissed in limine

Petition dismissed

1991 ALL L J 904

M L BHAT J

Smt Kiran Devi Petitioner v The Sahayak Awas Ayukat Evam Sahayak Nibandhak U P Avas Evam Vikas Parishad Lucknow and others Respondents

C M W P No 7862 of 1982 D/ 16 5 1991

(A) U P Co-operative Societies Act (11 of 1966), S 71 — Arbitrator — Power to decide dispute — Scope — Adjudication of dispute on merits — Arbitrator holding thereafter that reference was not competent — Not fair and proper

(Para 11)

(B) U P Co-operative Societies Act (11 of 1966), Ss 71, 98 — Arbitrator/Appellate Authority — Powers of — Sale-deed of plot executed by society in favour of its members found to be illegal, inoperative and non est — It could be cancelled by arbitrator/appellate authority — No necessity to approach civil court for getting sale-deed cancelled

Civil P C (1908), S 9

(Para 12)

(C) U P Co-operative Societies Rules (1968), R 98 — Object of — Rule seeks to eliminate favouritism and nepotism — Ingrained rules of fair play — Resolution allotting plot to wife of Administrator passed in meeting presided over by himself — Violative of R 98 — Procedure adopted in passing resolution of society must be fair and in accordance with law

U P Co-operative Societies Act (11 of 1966), S 130.

Corporate bodies — Resolutions — Validity — Procedure adopted must be fair and not tainted with nepotism and favouritism

The order of the Administrator of a Co-operative Society, given in a situation when the managing committee is not in existence [illegible]s to a resolution However, the procedure adopted, in passing the resolution must be fair and in accordance with law If the procedure is unfair, based on nepotism, favouritism or opposed to law a seal of legality cannot be given to it

(Para 13)

Where the resolution allotting a plot to the wife of the Administrator of the Society was passed in the meeting presided over by the Administrator himself the allotment would be in violation of the concept fair play envisaged by R 98, since the Administrator is a person interested in the allotment of plot to his wife Rule 98 seeks to eliminate possibility of favouritism and nepotism in the matter of granting any benefit to any person in whom the Chairman or Vice Chairman or any member elected for presiding over the meeting has personal interest The Rule enjoins upon the person who presides over the meeting of the committee in which resolution is passed, not to give benefit of any kind to any person in whom he has personal interest This is rule of fair play and the Rule of fair play is ingrained in every statute which concerns the public It is duty of every authority to act fairly

(Paras 13 14)

(D) U P Co operative Societies Act (11 of 1966), S 98 — Appellate authority — Power of allow additional evidence — No specific provision in the Act — Its power to record evidence for coming to just conclusion, however, implies power to allow additional evidence

Civil P C (1908), O 47, R 1

(Para 17)

(E) U P Co operative Societies Act (11 of 1966), S 98 — Appellate authority allowing additional evidence — Party against whom it is to be used must be given opportunity to cross-examine witness and to rebut the record sought to be produced — Matter remanded in instant case for affording such opportunity to party

Civil P C (1908), O 47, R 1

(Para 18)

Mr S P Srivastava, for Petitioner, Mr S K Garg Mr Ravi Kant Mr Radha Krishna Mr Prakash Krishna and Mr S M Babulkar for Respondents

ORDER — The petitioner is aggrieved against the impugned orders dated 22 3-1982 and 28 5 1982 passed by respondent No 1 By virtue of order dated 22 8 1982 it was held that allotment of plot No 43 in favour of the petitioner was illegal and consequently the sale deed executed in her favour also was bad By subsequent order dated 28 5 1982 the sale-deed executed in favour of the petitioner for plot No 43 for a consideration of Rs 5000/- was directed to be cancelled and amount of consideration was ordered to be refunded

2 The petitioner s case is that she was a member of co operative society which was registered under the W P Co-operative Societies Act The said Society was taken over by the Administrator after its supersession and among 8 plots which were allotted at a meeting, one of the plots was allowed to the petitioner by resolution of the society dated 13 9 1978 Thereafter a sale-deed was also executed in favour of the petitioner for the said plot and the same was registered

3 After some time, the co-operative society seems to have been brought under the Management of the elected committee and on 5 12 1979 the Secretary of the Housing Committee of the Society appears to have written a letter to the authority on the basis of the resolution dated 8 5-1978 for cancelling the allotment of 8 plots which were allotted by resolution dated 13 8 1978 to different persons Plot No 43 is one of the plots out of the 8 plots which was allotted to the petitioner Various reasons are given for said allotment of the plot being illegal and liable to be quashed This letter was treated as claim petition and the matter was referred to Arbitration under the provisions of Co-operative Societies Act It is contended that this letter was not a resolution therefore, no reference could be made on the basis of the said letter However, the Arbitrator after giving his opinion on the question of allotment of plot No 43 in favour of the petitioner, opined that the reference was incompetent because it was not based on the resolution passed by the managing committee Aggrieved against the order of the Arbitrator the respondents seem to have filed an appeal before respondent No 1 The appeal was accepted and decided vide order dated 22 3-1982 which order was modified on 28 5-1982 The allotment of the plot in favour of the petitioner was cancelled The sale deed was ordered to be cancelled and amount of consideration was ordered to be refunded

4 Learend counsel for the petitioner has made the following submissions in support of his contentions —

1 The letter dated 5-12 1979 written by the Secretary without there being any resolution, could not be a basis of arbitration and on the basis of the said letter the arbitration proceedings were incompetent

2 The sale-deed could not be cancelled by the appellate authority because cancellation of a sale-deed is the domain of Civil Courts

3 The allotment of plot in favour of the petitioner was valid because it was based on the order of the Administrator who was appointed after superseding the managing committee Therefore the order of the Administrator will be deemed to be a resolution of the managing committee of the Society

4 In appeal the appellate authority could not allow additional evidence and the additional evidence recorded by the appellate authority at the back of the petitioner could not form basis for the judgment of the appellate authority

5 That the same person decided the appeal who had earlier made the reference of the dispute to the Arbitrator

5 At the out set it may be stated that for the last proposition of the learned counsel for the petitioner that the same person had heard and decided the appeal who had made the reference to arbitration is not borne out from the record Neither it is in the pleading of the petitioner nor is supported by any document Therefore it is not correct that

the appellate authority was the same which had earlier made a reference to the arbitrator in regard to the claim of respondent No 3

6. One Om Prakash who claims to be allottee of plot No 43 with effect from 1968 was permitted to file a counter and defend his rights if any, which were likely to be affected by this writ petition It is the case of the Co-operative Society and Mr Om Prakash that allotment of plot in favour of the petitioner was illegal and was made by the Committee which was presided over by her husband, in violation of the provisions of law It is contended that no allotment could be made in her favour by the resolution passed by a Committee which was presided over by the husband of the petitioner It was next contended that she was not at all a member of the Society Plot No 43 which was allotted in favour of the petitioner had already been allotted in favour of Om Prakash in 1968

7 Under Section 71 of the Co-operative Societies Act (for short the Act), the disputes concerning constitution, management or the business of a co operative society other than a dispute regarding disciplinary action can be referred to the arbitration On receipt of the reference, the Registrar has a power to decide the dispute himself or refer it for decision to an arbitrator appointed by him or refer it, if the parties so request in writing, for decision to a board of arbitrators consisting of the three persons to be appointed in the prescribed manner

8 An appeal can be filed against the awards, orders and decisions Under clause 98(a) as appeal was competent before the Registrar and if the order is passed by the Registrar then it would lie to the State Government The appellate authority has been given powers to review its own orders which it has passed under Sections 97 and 98 of the Act The appellate authority has to hear the appeal on the date fixed and go through the record and hear the parties to the dispute or their authorised agents and pass such order on the appeal as it may deem just. The appellate order has to be reasoned order Learned counsel for the petitioner submitted that the appellate authority in terms of Rule 367 of the Co-operative Societies Rules has to go through the record of the case and not to any other extraneous evidence and thereafter make a decision in the appeal. In the present case it is stated that the record of appeal No 37W was made basis for decision and additional evidence was recorded without affording opportunity to the petitioner to cross examine the witnesses

9 Under Rule 98 of the Co-operative Societies Rules it is provided that the Chairman or in his absence the Vice Chairman or in the absence of the both, a member elected by the members present at the meeting shall preside over the meeting There is proviso added to this Rule which says that no person including the Chairman or ViceChairman shall preside over a meeting when matters in which he has a personal interest are to be discussed

10 On the basis of the aforesaid provisions of law it is to be seen whether the order passed by respondent No 1 is in accordance with law or does it suffer from any patent illegality

11 It is strange that arbitarator has stated that the reference before him was incompetent If he was of the opinion that the reference before him was incomepetent, then he could not decide the matter covered by reference on merits If the reference was incompetent, according to the arbitrator the best course for him was to refuse to go into the merits of the case and not to pronounce on any point which was subject matter of the reference On the other hand the arbitrator has chosen a novel method to deal with the matter He has decided the entire dispute which was referred to him by a reference, then after having given an opinion on the merits of the case stated that reference was illegal However, the arbitrator having once entered upon the reference and having given his opinion on the reference it was not proper for him to say at the subsequent stage of the proceeding that reference was not competent Once the arbitrator had chosen to pronounce on the merit of the case then it was not fair for him to hold the reference was incompetent In the present case the order dated [illegible] 1979 makes reference to the resolution date 16-

5 1979 by which committee of management seems to have taken a decision to prefer a claim with regard to the allotment of the eight plots by a resolution dated 13 9 1979 The Arbitrator could at the best demand a copy of the resolution from respondents Nos 1 and 2 first and thereafter proceed to deal with the arbitration proceeding Without doing that he gave a finding in favour of the petitioner on merits and thereafter he held that the reference was incompetent The approach adopted by the arbitrator is throughly misconceived and opposed to the norms underlying the concept of arbitration The arbitrator has decided the reference on merits and whether there was a valid reference or not was a matter to be decided by the appellate authority The appellate authority has not touched upon this point Therefore contention of Mr Srivastava that no arbitration proceeding could proceed on the basis of the letter without there being any resolution cannot be accepted After having derived the benefits of the arbitrator s order it does not lie in his mouth that arbitrator s order could not be pronounced in the manner in which he had decided the reference Had the appellate Court also decided in favour of the petitioner then the petitioner probably was not aggrieved by the arbitration proceeding His grievance started from the appellate order It is probably conceived by the petitioner that by assailing the arbitration proceeding as being incompetent the appellate order would also disappear I am affraid that this cannot be ruled for the simple reason that arbitrator has taken cognizance of the dispute and pronounce his opinion on the merits of the case and after that has unnecessarily held the reference as incompetent The observation of the arbitrator in this regard is redundant and does not accord with the context of the matter before him

12 It was secondly argued that the sale-deed could not be cancelled by the appellate authority, it can be cancelled only by the Civil Court In my opinion this contention also is misplaced If the sale-deed as a matter of fact was held to be illegal, bad or in violation of the provisions of law, the appellate authority had and inoperative or non est If such a finding was returned, cancellation of the sale-deed would be implicit in such a finding What the appellate authority actually means to say is that the sale-deed is illegal inoperative or non est as against the interest of the society and would confer no benefit on the petitioner and if he declares the sale deed as cancelled no fault can be found in that finding His order if not set aside in the writ petition has to be recorded in the Sub-Registrar s register Therefore, it is not correct to suggest that after having declared the sale-deed illegal the respondent society shouldl resort to a civil litigation for getting the sale-deed cancelled This would only multiply the litigation and would be futile type of litigation The contention of the learned counsel for the petitioner in this regard is therefore overruled

13 It was next contended that the order of the arbitrator in respect of the allotment of plot in favour of the petitioner was valid and final The argument is based on the plea that there was no managing committee at the relevant time in existence, therefore, the Administrator had the power of the managing committee and his order i.e. allotment of the plot in favour of the petitioner will be deemed to be a resolution under the Act So far the proposition that the order of the Administrator given in a situation when the managing committee was not in existence, would amount to a resolution, is not disputed. But the matter is not as simple as it is projected. The procedure adopted in passing the resolution must be fair and in accordance with law If the procedure is unfair based on nepotism favouritism or opposed to law, a seal of legally cannot be given to it by the order of the arbitrator In the present case it is contended by the respondents that there has been violation of Rule 98 of the Co-operative Societies Rules which would not permit Mr Kanchan Singh, husband of the petitioner to preside over the meeting dated 13-9 1978 in which a resolution for allotment of plot in favour of the petitioner was passed. Rule 98 of the Co-operative Societies Rules has a laudable purpose behind it. It seeks to

eliminate possibility of favouritism and nepotism in the matter of granting any benefit to any person in whom the Chairman or Vice-Chairman or any member elected for presiding over the meeting, has personal interest There is no gainsaying that the petitioner s husband Mr Kanchan Singh who had presided over the meeting dated 13-9 1978 could have no interest in the petitioner The Rule enjoins upon the person who presides over the meeting of the committee in which resolution is passed, not to give benefit of any kind to any person in whom he has personal interest This is rule of fair play and the Rule of fair play is ingrained in every statute which concerns the public It is the duty of every authority to act fairly de Smith in his Judicial Review of Administrative Action Fourth Edition page 238 says —

> "That the donee of a power must act fairly" is a long settled principle governing the exercise of discretion though its meaning is inevitably imprecise Since 1967 the concept of a duty to act fairly has often been used by judges to denote an implied procedural obligation In general it means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative Given the flexibility of natural justice it may not have been strictly necessary to use the term duty to act fairly" at all, but its usage is now firmly established in the judicial vocabulary Its value has lain in assisting the extension of implied procedural obligations to the discharge of functions that are not analytically judicial, and in emphasising that acting in accordance with natural justice does not mean forcing administrative procedures into a strait-jacket The comparatively recent emergence of this use of the duty to act fairly" may also enable the courts to tackle constructively procedural issues that have not traditionally been regarded as part of the requirements of natural justice It may therefore be less confusing to say that an immigration officer or a company inspector or a magistrate condemning food as unfit for human consumption or an educational institution considering an application by a student for admission is obliged to act fairly rather than obliged to act judicially (or to observe natural justice which means the same thing) However close analysis of the relevant judgments is apt to generate its own confusion for sometimes one judge will differentiate a duty to act fairly from a duty to act judicially and another will assimilate them, both judges being in full agreement as to the scope of the procedural duty cast on the competent authority"

14 Therefore, if Rule 98 of the Rules is violated and the person who has presided over the meeting is allowed to take up the matter for decision in which he is personally interested the guarantee of fair play underlying the Rules will be completely obliterated Therefore, it is necessary that Rule 98 of the Co operative Societies Rules be punctually observed and discussion on any matter in a meeting be not permitted where the presiding officer of the meeting has a personal interest in the said discussion It is unlikely that Mr Kanchan Singh would not have any interest in his wife who is the petitioner The resolution of allotment in favour of the petitioner having been passed in the meeting of which her husband Kanchan Singh was the president is dehors of concept of fair play However I would leave this aspect to the appellate authority for reconsideration after I deal with the next point urged by learend cousel for the petitioner

15 The petitioner's next grievance is that the additional evidence was called for without any authority and without any provision being there for the purpose and the said evidence was considered at her back without having given any opportunity to cross-examine the witnesses or adduce evidence in rebuttal

16 This argument can be separated in two parts First part relates to the jurisdiction of the appellate authority to allow the additional evidence produced at the appellate stage, and the second part relates to the question of denying opportunity to cross examine the additional witnesses and to rebut the same by the person against whom additional evidence is recorded

17 So far the first part of the proposition is concerned I do not think any illegality in allowing the additional evidence at the appellate stage It is true that there is no specific provision whereby the appellate authority in the present case could direct production of additional evidence but if it is held that it has the power to record the evidence for coming to a just conclusion then power to allow additional evidence must be concerned to the appellate tribunal Therefore it is not against the provision of law The appellate authority could allow additional evidence or further evidence could be recorded for coming to a just conclusion The second limb of this proposition as urged by the petitioner cannot be said to be without substance

18 The appellate authority seems to have taken into consideration the record of appeal No 37 W and made that record basis of his judgment There is no dispute if appellate authority is of the opinion the record of that file could be made basis of his judgment There is no dispute if the appellate authority records any statement of any witness on which he could base his judgment But before that is done the person against whom the record of the other case is used of statement of the witness is recorded must be given a right to cross examine the witness and to rebut the record It is not the concern of the tribunal as to whether the party against whom the record was used or evidence was recorded would be able to rebut it or not, but right to cross examine the witness is necessarily to be given to the person who is likely to be affected by calling the additional evidence and by production of the record. If that is not done, principle of natural justice would stand violated

19 The petitioner in this case was, therefore entitled to be granted an opportunity to rebut the evidence which was brought against her and to cross-examine any witness whose statement was recorded against her This is so because the petitioner is entitled to get full and fair opportunity from the tribunal to rebut any evidence which is recorded against her and which is likely to affect her interest adversely The petitioner has been denied the opportunity to rebut the evidence and cross examine the witnesses which were produced at the appellate stage against her therefore the appellate judgment as it stands cannot be used against her unless she gets fair opportunity to rebut the additional evidence if any produced against her and to cross examine the witnesses if recorded at her back

20 For the foregoing reasons, the writ petition is allowed only on the ground of violation of principle of natural justice by the appellate authority All other points urged by the petitioner are over ruled. The appellate judgments dated 22 3 1982 and 28 5-1982 are set aside with the directions that the appellate authority shall decide the appeal de novo and if it has allowed the appellant to produce additional evidence or used any documents which was likely to effect the interest of the petitioner he shall give fair opportunity to the petitioner of rebutting the evidence so produced by the appellant against her and allow the petitioner to adduce evidence in rebuttal Thereafter the appellate authority shall pass a fresh reasoned order based on the material before him without being inflenced by any other consideration For this purpose one opportunity on consecutive two days shall be given to the petitioner Smt Kiran Devi for adducing evidence in rebuttal and for cross examining the witnesses whose statements had been recorded at her back This should be done within two months from the date of production of a certified copy of this order before the appellate authority In the meantime the appellant and Om Prakash who had been heard in this writ petition, are directed not to change the present position on the spot and maintain status quo in respect of the plot in question

Order accordingly

1991 ALL L J 910

FULL BENCH

B P JEEVAN REDDY C J
V N KHARE AND R B MEHROTRA JJ

Kalyan Dutt Kaushik and another Petitioner v The District Magistrate Hardwar and others Respondents

Civil Misc Writ No 9097 of 1990 and 6774 18203 12913 of 1989 and 11171 16885 16633 of 1990 D/- 8 7 1991

U P Municipalities Act (1916), Ss 54(A)(1), (2), (9), 54(1) — Election of Vice Presidents — Words "subject to the provisions of S 54(4)" in S 54A(2) — Creates link between S 54 and S 54(2) to (9) — Vacancy in office of Vice President — Expiry of three months — President cannot conduct election under S 54(1) — It has to be conducted in accordance with procedure under sub-sections (2) to (9) of S 54-A.

(1989) 2 UPLBEC 248, Overruled

After the expiry of three months from date of account of vacancy the President cannot conduct the election of Vice-President under sub-section (1) of Section 54 It has to be conducted only in accordance with the procedure prescribed by sub sections (2) to (9) of Section 54A and this has to be done as promptly as possible after the expiry of the three months period specified in Section 54(4) Within three months of the Constitution of the Board as notified under Section 56 or within three months from the date of occurrence of vacancy in the office of the Vice-President as the case may be the election of Vice-President has to take place in accordance with sub-section (1) of Section 54 and not in accordance with the procedure prescribed in sub-sections (2) to (9) of Section 54A If, however, the President fails or omits to have the Vice-President elected within the aforesaid period the Vice President has got to be elected in accordance with the procedure prescribed in sub-sections (2) to (9) of Section 54-A Moreover, even in a situation attracting the provisions contained in sub section (1) of Section 54A, i e in a situation where no Vice-President has been elected in accordance with the Act a Vice President has to be got elected in accordance with sub sections (2) to (9) of Section 54A Mere failure of the President to get the Vice-President elected within a period of three months aforesaid does not be itself attract the action under Section 54A(1) it only means that the Vice President has got to be elected in accordance with sub-sections (2) to (9) of Section 54A Sub section (1) of Section 54A is attracted only when two essential conditions (each of which contemplates more than one situation) are satisfied In computing the period of three months prescribed in sub section (4) of Section 54 the period during which the election of Vice President is stayed by a competent authority or court shall have to be excluded

(1989) 2 UPLBEC 248 Overruled.

(Paras 21 22 23)

The words subject to the provisions of sub-section (4) of Section 54 added at the inception of sub section (2) have created a link between Section 54 and sub-sections (2) to (9) of Section 54A Sub-section (4) of Section 54 is continuation of sub-section (1) of Section 54 and by these words, sub-sections (2) to (9) of Section 54A have become a continuation of sub-section (4) of Section 54 The plea that, all they mean is that election of the Vice President under sub sections (2) to (9) being the only procedure therefor must be completed within the period of limitation prescribed under sub-section (4) of Section 54 would not be tenable If the Legislature wished to say that a Vice President should be elected only and only in accordance with sub-sections (2) to (9) of Section 54A, what they ought to have done was to amend Section 54 suitably, which they have not chosen to do Not only they did not do it they reaffirmed the mode of election prescribed by sub-section (1) of Section 54 by inserting sub-section (4) in that Section The proper meaning to be given to the said opening words in sub-section (2) of Section 54A is to say that the provisions contained in sub-sections (2) to (9) are supplemental to and are in continuation of the provisions contained in Section 54 which means that if a Vice-President is not elected within a period of three months prescribed in Section 54(4) he must be got elected by the District Magistrate in accordance with the procedure prescribed under sub-sections (2) to (9) of Section 54A This interpretation harmonises the several provisions in both the Sections and is also consistent with the language employed therein

(Para 18)

Cases Referred Chronological	**Paras**
1989 All LJ 1208 (1989) 2 UPLBEC 248 (Overruled)	4 11 12, 21
1980 UPLBEC 266	20
1962 All LJ 113 ILR (1962) 1 All 586	19
(1917) 62 Law Ed 372 245 US 418 Towne v Elsner	18

Ravi Kant and R K Garg for Petitioner K R Singh K N Tripathi and Standing Counsel for Respondents

B P JEEVAN REDDY, C J — A Division Bench of this Court comprising one of us (V N Khare, J) and J K Mathur, J has referred two questions for the consideration of Full Bench They are —

(i) Whether election of senior and junior Vice-Presidents in a duly constituted Municipal Board, the President of which has been elected and is willing to conduct election, can be held under the provisions of Section 54(1) of the U P Municipalities Act by a special resolution

(ii) If so, whether such election has to be held within a period of three months from the date of constitution of the Board or occurrence of vacancy

If so whether the election after the expiry of the aforesaid period has to be held under the provisions of Section 54 A of the U P Municipalities Act "

2 Though a number of writ petitions are referred to Full Bench, it would be sufficient if we state the facts in two of them viz W P No 9097 of 1990 and W P No 6774 of 1989 The facts in W P No 9097 of 1990 are to the following effect

The election of Municipal Board Hardwar took place on 10-1 1989 The Chairman was elected on 3 2-1989 Oath of office was administered to the members on 7 2 1989 On 20 2 1989 a notice was issued by the Executive Officer convening a meeting of the Board for electing senior and junior Vice Presidents on 25 2 1989 At the meeting so held presided over by the Chairman of the Municipal Board respondents 3 and 4 were elected as senior and junior Vice Presidents respectively The election of the junior and senior Vice Presidents is challenged in this writ petition on the ground that the meeting, at which they were elected not having been convened in accordance with the provisions contained in sub sections (2) to (9) of Section 54A of U P Municipalities Act the election is void. Respondents case however, is that the meeting has been rightly convened, as contemplated by sub section (1) of Section 54 and the election of junior and senior Vice-Presidents at the said meeting by special resolution as provided by the said sub-section is perfectly in order

3 W P No 6774 of 1989 relates to the validity of election of senior and junior Vice-Presidents of the Municipal Board Ballia who too were elected as provided by Section 54(1) The two grounds on which it is challenged are —

(i) That the meeting, at which the senior and junior Vice-Presidents were elected, was not convened in accordance with the provisions contained in sub-sections (2) to (9) of Section 54A of the Act and

(ii) That in any event, since their election was not held within three months of the constitution of the Board, it could not have been held in accordance with sub-section (1) of Section 54, it ought to have been held only in accordance with sub-sections (2) to (9) of Section 54 A

4 It is in the light of the above facts that the Division Bench has stated the aforesaid two questions for consideration by the Full Bench. The reference is primarily occasioned by the fact that the Division Bench did not agree with the view expressed by an earlier Division Bench in Municipal Board Bachhrawan v. Divisional Commissioner, Moradabad (1989) 2 UPLB & EC 248 (1989 All LJ 1208) which practically upholds the petitioners contention. The later Division Bench, however, was inclined to uphold the respondents contention.

5 The U. P. Municipalities Act was enacted in the year 1916. It has undergone several amendments from time to time. We shall refer to those provisions which are relevant for the present controversy. Section 6 of the Act provides for the incorporation of the Municipal Boards and their general functions. It says that in every Municipality there shall be a Municipal Board which shall be a body corporate, having perpetual succession and common seal vested with the power of acquiring, holding and transferring properties and of entering into contracts. Section 9 provides for the composition of the Board. It consists of the President, elected members and ex officio members. Section 10-AA contains temporary provisions relating to administration of a Board until a new Board is constituted. It says that where the term of a Board has expired and a new Board has not been constituted, all the powers, functions and duties of the Board, its President and its committees shall be vested in and be exercised, performed and discharged by an officer, appointed in that behalf by the State Government called the Administrator. Elections to the Board are held under the supervision of Director of Elections (Local Bodies), vide Section 13-B. Section 43 provides for election of President of the Board. This Section has undergone amendments from time to time. Prior to its amendment by U. P. Act No. 17 of 1982 it provided that the President shall be elected by electors in the Municipality (vide sub-section (1)). In other words, President was elected directly by electors of the Municipality, and not by members of the Board. (It may be stated that prior to Act 41 of 1976, President was elected by members of the Board). By virtue of Act 17 of 1982 the mode of election of President depends upon classification of the Board. In the case of a Board of a city other than a city declared as such under Section 3, its President is elected by members of the Board. In other cases, President is elected by electors in the Municipality. Section 44 A provides that if a casual vacancy occurs in the office of President owing to death, resignation or any other cause, President shall be elected within three months of the occurrence of the vacancy in the manner prescribed in Section 43.

6 Section 54 provides for "election, term of office and resignation of Vice President". This Section too has undergone amendments from time to time. Sub-section (4) was introduced by Act of 1976. The amendments in sub-sections (1) and (2) are not very material for the present purposes. Section 54 A was introduced in the Act by Act I of 1955. Sub-section (1) of Section 54A was substituted by Act 26 of 1964. Again by Act 41 of 1976, both sub-sections (1) and (2) of Section 54-A were substituted. Act 41 of 1976 simultaneously introduced sub section (4) of Section 54.

7 Since the controversy in this batch of writ petitions turns on the language of these two Sections (Ss. 54 and 54A) and also because its legislative history is relevant for a proper understanding of the issues in controversy, we shall first set out Section 54 — including sub-section (4) inserted by Act 41 of 1976 and then set out Section 54-A, as it stood originally and as amended by subsequent Amendment Acts aforesaid. Section 54 reads as follows :—

"54. Election, term of office and resignation of Vice President.— (1) Every Board shall have a Vice-President of a senior and a junior Vice-President elected, as occasion arises, by the Board from among its members by special resolution.

(2) Except as otherwise provided in this Act, the term of office of a Vice-President of any

description shall be conterminus with the term of the Board (Prior to its substitution sub-section (2) read as follows

(2) The term of office of a Vice-President of any description shall be one year from the date of his election or the residue of his term of office as a member of the Board, whichever is less')

(3) Any Vice-President wishing to resign may intimate in writing his intention to do so to the President and on his resignation being accepted by the Board, he shall be deemed to have vacated his office

(4) The election of a Vice-President under sub-sections (1), (2) and (3) shall be completed within three months from the date of the due constitution of the Board as notified under Section 56 or from the date of occurrence of the vacancy, as the case may be"

Section 54A as introduced by Act 1 of 1955 reads as follows —

"54A. (1) Where a person on being elected President fails or refuses to function or is otherwise not able to function and a Vice-President has not been elected in accordance with this Act, the powers and functions of the President except presiding at a meeting of the Board shall, until a Vice-President has been elected, be exercised and performed, if the District Magistrate so directs and subject to such conditions as he may specify, by the Executive Officer and in the case of a Board where there is no Executive Officer, by the Secretary, and the following procedure shall be followed for the election of a Vice-President

(Emphasis added)

(2) The meeting for the election of the Vice-President shall be held at the office of the Board and on the date and time appointed by the District Magistrate The notice of the meeting and the date and time appointed therefor shall be sent to every member of the Board at his place of residence 7 clear days before the date fixed for the meeting. A copy of such notice shall also be published in such manner as the District Magistrate may direct and thereupon every member shall be deemed to have received the notice.

(3) The District Magistrate shall arrange with the District Judge for a stipendiary Civil Judicial Officer to preside at the meeting convened under this Section and no other person shall preside over it If within half an hour of the time appointed for the meeting, the Judicial Officer is not present to preside at the meeting, the meeting shall stand adjourned to the date and the time to be appointed and notified later to the members by that officer under sub-section (4)

(4) If the Judicial Officer is unable to preside at the meeting, he may after recording his reasons adjourn the meeting to such other date and time as he may appoint but not later than 7 days from the date appointed for the meeting under sub-section (2) He shall without delay communicate in writing to the District Magistrate the adjournment of the meeting It shall not be necessary to send notice of the date and time of the adjourned meeting to members individually but the District Magistrate shall give notice of the date and the time of the adjourned meeting by publication in the manner provided in sub-section (2)

(5) Save as provided under sub-sections (3) and (4) the meeting convened under this Section shall not be adjourned for any reason.

(6) As soon as the meeting convened under this section has commenced, the Board shall proceed to elect the Vice-President

(7) The Judicial Officer shall not be entitled to vote at the election

(8) In case of a equality of votes, the Judicial Officer shall decide by lot which of the candidates having equal votes is to be declared elected.

(9) The Judicial Officer shall declare the result of the election at the meeting and shall forward a copy of the minutes of the meeting to the President and the District Magistrate" Act 26 of 1964 substituted sub-section (1) alone. The substituted sub-section (1) reads as follows —

"Provision for exercise of powers, etc. of

President in certain contingencies and procedure for election of Vice-President — (1) Where a person on being elected President fails or refuses to function or is otherwise not able to function, or a casual vacancy occurs in the office of the President within the meaning of Section 44-A and no Vice-President has been elected in accordance with this Act, or there is no Vice-President otherwise able to function, the powers and functions of the President shall, until a President or a Vice President is able to function, be exercised and performed by the District Magistrate or by a Gazetted Officer not below the rank of a Deputy Collector appointed by the District Magistrate in this behalf"

8. Act 41 of 1976 substituted sub-sections (1) and (2) The substituted sub-sections (1) and (2) read as follows —

(1) Where a person on being elected President fails or refuses to function or otherwise is not able to function, or a casual vacancy occurs in the office of the President within the meaning of Section 44-A, and no Vice-President has been elected in accordance with this Act, or there is no President otherwise able to function, the powers and functions of the President shall, until a President or Vice-President is able to function, be exercised and performed by the District Magistrate or by a Gazetted Officer not below the rank of a Deputy Collector appointed by the District Magistrate in this behalf and such officer shall be called the Administrator, and accordingly, the provisions of Section 10-AA shall mutatis mutandis apply

(2) Subject to the provisions of sub-section (4) of Section 54, the meeting for the election of the Vice-President shall be held at the office of the Board and on the date and time appointed by the District Magistrate The notice of the meeting and the date and the time appointed therefor shall be sent to every member of the Board at his place of residence seven clear days before the date fixed for the meeting. A copy of such notice shall also be published in such manner as the District Magistrate may direct, and upon such publication every member shall be deemed to have received the notice

Sub-sections (3) to (9) remained untouched by the aforesaid two Amendments Acts

9 We shall now set out the controversy

The writ petitioners say that once Section 54-A was amended by the Amendment Act of 1976 (Act 41 of 1976), election of the Vice-President (or Vice-Presidents, as the case may be) can be held only in accordance with the procedure prescribed in sub-sections (2) to (9) of Section 54-A, the Vice President or Vice-Presidents cannot be elected otherwise than in accordance with the procedure prescribed by the said sub-sections Section 54A, after it was amended in 1976 provides for two distinct situations Sub-section (1) provides for a contingency when both the President and the Vice-President are not in office or are unable to act, whereas sub-sections (2) to (9) provide the procedure for conducting the election of Vice-President Sub-sections (2) to (9) are not in (sic) of sub-section (1) The link between sub-section (1) and sub-sections (2) to (9) got snapped with the 1976 amendment, if not with the 1964 amendment. In other words, the Vice-President can be elected only in a meeting convened by the District Magistrate and presided over by a stipendiary Civil Judicial Officer He cannot be elected at a meeting of the Board convened by the President/Executive Officer and presided over by the President.

10 On the other hand, the contention of the respondents is to the following effect

The normal and ordinary mode of election of Vice-President is the one prescribed by sub-section (1) of Section 54 He is to be elected at a meeting of the Board, by a special resolution The procedure prescribed by sub-sections (2) to (9) of Section 54A is attracted in a situation where sub-section (1) of Section 54A is applicable It is also attracted where the President refused or fails to get a

Vice-President elected within three months of the constitution of the Board or occurrence of casual vacancy, as the case may be It is only where one of these situations exists that the District Magistrate convenes the meeting of the Board for election of Vice-President which meeting has to be presided over by a stipendiary Civil Judicial Officer The procedure prescribed by sub-sections (2) to (9) of Section 54A is not the only mode of election of the Vice-President, but a special mode, which is attracted only where the District Magistrate steps in as Administrator, as contemplated by sub-section (1) of Section 54-A or where the Vice-President's election is not held under Section 54(1) within three months. Section 54-A was introduced only in 1955 Even prior to Act I of 1955 the office of Vice-President was there and he was elected in accordance with the procedure prescribed in Section 54(1) Section 54(1) has not been amended in any manner by the Amendment Acts of 1964 or 1976 On the contrary the 1976 Amendment Act, which substituted sub-sections (1) and (2) of Section 54A, also introduced sub-section (4) in Section 54, which affirms the respondents contention that the procedure prescribed by Section 54(1) was re-affirmed and continued.

11 The interpretation urged by the writ petitioners is supported by the decision of a Division Bench of this Court in Municipal Board, Bachhrawan v Divisional Commissioner, Moradabad, (1989) 2 UPLB & EC 248 (1989 All LJ 1208) The Division Bench, which made this reference to the Full Bench, disagreed with the view taken in the said case According to the later Division Bench, the procedure prescribed by sub-sections (2) to (9) of Section 54-A is attracted only where sub-section (1) of Section 54-A comes into play and in no other It opined that a President is under a duty to get the Vice-President elected within three months. If he fails to do so, action under Section 54-A(1) would be attracted and thereafter would the Vice-President be elected in accordance with sub-sections (2) to (9) of Section 54-A. It also opined that once the three months period prescribed in Section 54(4) expires, the election of the Vice-President cannot be held under Section 54(1) It is this controversy which we have to pronounce upon For this we have to turn back to the language of Sections 54 and 54A, which is already set out hereinabove But before we do so, we may refer to one more provision, namely Section 55, which provides that in the absence of the President, the Vice President shall perform the duties of the President including the duty to preside over a meeting of the Board

12 Sub-section (1) of Section 54 provides that every Board shall have a Vice-President (or a senior and junior Vice-President, as the case may be) elected by the Board from amongst its members of a special resolution Section 54 occurs in Chapter II of the Act Chapter II provides for declaration of Municipalities, constitution of the Municipal Board, election of President and Vice-Presidents and appointment of Executive Officer and other servants of the Municipality After members of the Board are elected, the Board constituted and the President elected, Vice-President has also got to be elected This is necessary because in case a vacancy arises in the office of President or the President is unable to function for any reason whatsoever, the Vice-President has to perform the functions of the President, and without President, there cannot be an effective Board — effective in the sense of capable of functioning It is for this reason that immediately after the provisions relating to election, powers and other matters concerning the office of President occurs Section 54 which deals with "Election, terms of office and resignation of Vice-President" (This is the marginal note to Section 54, which has remained unchanged in spite of the amendments in 1955 1964 and 1976) Sub-section (1) of Section 54 provides that the Vice-President shall be elected by the Board from amongst its members by special resolution Now the words "by special resolution" are not without a meaning Section 87 prescribes the manner in which the Board shall transact its business. It says,

"subject to any provision to the contrary made by regulation in this behalf, any business may be transacted at any meeting." The first proviso to this Section says "provided that no business which is required to be transacted by a special resolution shall be transacted unless previous notice of the intention to transact such business has been given." Section 88 prescribes the quorum for the meeting. Sub-section (1) says that it shall be necessary for the transaction of any business other than business which is required to be transacted by a special resolution that not less than one-third of the total number of the Board for the time being shall be present. Sub-section (2) prescribes and provides for a special quorum where business is to be transacted by a special resolution. It says, "it shall be necessary for the transaction of business which is required to be transacted by special resolution that not less than one-half of such members shall be present." Section 89 provides who is to preside at a meeting of the Board. It is the President and, in his absence, the Vice-President and, in the absence of both of them, any of the members to be elected by the members present. It is thus clear that for passing a special resolution, not only previous notice of the particular business has to be given, but it requires a special quorum, that is, not less than one-half of the members of the Board for the time being. This was the position obtaining till 1989 when a Division Bench of this Court ruled in Municipal Board, Bachhrawan, (1989 All LJ 1208) (supra) that by virtue of 1976 amendment, the position has undergone a change. It may be noticed at this juncture that sub-section (4), which was added by the 1976 Amendment Act, expressly provided that "the election of a Vice-President under sub-sections (1), (2) and (3) shall be completed within three months from the date of the due constitution of the Board as notified under Section 56 or from the date of occurrence of the vacancy, as the case may be." This sub-section thus expressly contemplates the election of the Vice-President under sub-section (1). In the face of this provision, it is difficult to say that sub-section (1) does not deal with the mode of election of the Vice-President or that it merely declares that there ought to be a Vice-President.

13. Now, coming to Section 54A, we shall first deal with the section as it stood at the time of its introduction in 1955. Sub-section (1) contemplated and provided for a situation where (1) a President is elected but he fails or refuses to function as such or is otherwise not able to function and (2) a Vice-President has not been elected in accordance with this Act. In such a situation, it provided that the powers and functions of the President (except presiding at a meeting of the Board shall be exercised and performed by the Executive Officer and, where there is no Executive Officer, by the Secretary, if the District Magistrate so directs and subject to such conditions as he may specify. Not only that, a Vice-President had to be elected following the procedure prescribed in the ensuing sub-sections. Sub-sections (2) to (9) prescribed the procedure to be followed. The meeting had to be convened by the District Magistrate, of which clear seven days notice had to be given and the notice was also to be published in the specified manner, the meeting had to be presided over by a stipendiary Civil Judicial Officer. It also provided as to what should happen if the Judicial Officer was not present at the meeting or where he was present but adjourned the meeting. It is not necessary to notice the procedure prescribed in sub-sections (2) to (9) in any detail for the present purpose. The more important provision is the one in sub-section (1). Indeed, sub-section (1) did not contemplate a situation where there was a vacancy in the office of the President, it contemplated a situation where President was there, but he failed or refused to function or was unable to function. The second simultaneous condition for attracting sub-section (1) was that a Vice-President is not elected "in accordance with this Act." It is necessary to notice the significance of the words "in accordance with this Act" — which words continued to be employed in spite of the substitution of the sub-section twice over. These words indicate that Vice-President

could be but not elected, in accordance with the procedure already prescribed by the Act Only in such a situation was the Executive Officer/Secretary to step in and exercise and perform the powers and functions of the President, except presiding over the meetings of the Board, if the District Magistrate so directed and subject to the conditions that he might have specified. Where the District Magistrate directed the Executive Officer/Secretary to so function in the place of the President, he was also under an obligation to have the Vice-President elected in accordance with the procedure prescribed in sub-sections (2) to (9) It, therefore cannot be said that Section 54A as it stood at the time of its introduction in 1955 replaced the existing mode of the election of Vice-President This much is conceded even by the petitioners

14 Now let us see how the position underwent change by virtue of the 1964 and 1976 Amendments First the 1964 Amendment Act It substituted sub-section (1) of Section 54A alone According to the substituted sub-section, two essential conditions to be satisfied are —

(i) That the President is elected but fails or refuses to function Or a casual vacancy occurs in the office of President within the meaning of Section 44A

And

(ii) That no Vice-President has been elected in accordance with this Act or where the Vice-President is elected but he is otherwise unable to function

If any of the contingencies contemplated by these two conditions is satisfied, the powers and functions of the President are to be exercised and performed by the District Magistrate or such Officer as may be designated by him till President or Vice-President is able to function. In other words, the two essential conditions underwent expansion In the first condition, a casual vacancy was also added Similarly, in the second condition also, a further contingency was added, viz., where the Vice-President is elected but is otherwise not able to function A further change is that powers and functions of the President were to be exercised by District Magistrate himself or by such Officer as he may designate (a Gazetted Officer not below the rank of a Deputy Collector) and this was to be continued till a President or Vice-President is able to function It may be remembered that according to the provisions of sub-section (1), as it stood before the 1964 amendment, the powers and functions of the President were to be exercised and performed by the Executive Officer or, in his absence Secretary of course where the District Magistrate so directed and subject to the conditions as may be specified by him Now those powers were to be exercised by the District Magistrate himself or such other officer as he may appoint in that behalf The limitation that such officer could not preside over the meetings of the Board was removed Another change was that the words and it is this deletion which has given rise to an argument for and on behalf of the petitioners

15 1976 Amendment Act Though this Amendment Act substituted sub-section (1) of Section 54A in its entirety the real change is only the addition of words and such officer shall be called the Administrator and accordingly the provisions of Section 10AA shall mutatis mutandis apply at the end of sub-section (1) This addition is merely descriptive in nature and specifies the ambit of the powers to be exercised by such Administrator and has no relevance to the controversy raised before us Another change made by this Amendment Act is the substitution of sub-section (2), but again the only change in the addition of words "subject to the provisions of sub-section (4) of Section 54" at the beginning of sub-section (2) There is a slight phraseological change in the last sentence of the sub-section, but that is wholly inconsequential, for the words and thereupon the words 'and upon such publication' have been substituted.

16 Let us now consider whether these two amendments, effected in 1964 and 1976, have brought about a change in the manner of election of the Vice-President It is true

that by deletion of the words "and the following procedure shall be followed for the election of a Vice-President" the linkage between sub-section (1) and sub-sections (2) to (9) of Section 54A got snapped. There is yet another indication. By 1964 amendment, second of the two conditions, which must be satisfied before the District Magistrate steps in, has been expanded, viz. it not only takes in a situation where a Vice-President is not elected, but also a situation where the Vice-President is elected but he is unable to function for one or the other reason. It is obvious that where a Vice-President has been elected but is merely unable to function there is no question of electing another Vice-President in his place. Not only this, the 1976 amendment created a linkage between sub-section (4) of Section 54 and sub-sections (2) to (9) of Section 54A. Sub-section (2) of Section 54A now opens with the words "subject to the provisions of sub-section (4) of Section 54". At the same time, we must emphasise one feature. Though sub-section (1) of Section 54A was substituted twice, the words "and a Vice-President has not been elected in accordance with the Act" have remained constant. (There is a slight phraseological change. These words became "and no Vice-President has been elected in accordance with this Act".) The significance of this feature cannot be overlooked. It contemplates a Vice-President not having been elected in accordance with the Act, i.e., in accordance with the preceding provisions.

17. Before expressing ourselves on the matter in controversy, however, we think it appropriate to make a few observations and to recall certain well-settled rules of interpretation. The present controversy is the result of sloppy drafting. Had the draftsman of the Amendment Acts been more careful, we are sure he would have made his meaning clear and would not have drafted them in the manner he did, giving rise to this controversy. All the same, the function of the court is to ascertain the intention of the legislature, having regard to the language employed, and to adopt such interpretation as is reasonable and fits in with the context. The attempt should also be to harmonise the several seemingly conflicting or contradictory provisions.

18. It is not without significance that notwithstanding several amendments over the years, sub-section (1) of Section 54 has remained untouched. We have already expressed the view that sub-section (1) of Section 54 lays down the procedure for electing a Vice-President. It would not be right to say that the said sub-section merely declares that there shall be a Vice-President. It says specifically that a Vice-President shall be elected (i) by the Board, (ii) from amongst its members and (iii) by special resolution. Learned counsel for the petitioners were hard put to explain this situation. Indeed, Mr Ravi Kant, one of the learned counsel appearing for the petitioners, took the stand that the aforesaid words occurring at the end of sub-section (1) of Section 54, must be deemed to have been impliedly repealed by the 1964 and 1976 Amendments, which substituted sub-sections (1) and (2) of Section 54A. It is obvious that this is an extreme argument. Even if we assume that theory of implied repeal can be applied as between the provisions of the same enactment, even then it can be resorted to only where such a course is absolutely unavoidable. We do not think such a situation exists here. The 1976 Amendment Act, which substituted sub-sections (1) and (2) in Section 54A, also inserted sub-section (4) in Section 54. Sub-section (4) of Section 54 says, "the election of a Vice-President under sub-sections (1), (2) and (3) shall be completed within three months ...". This sub-section thus affirms that election of the Vice-President takes place under sub-section (1) and that it is to take place within three months from the date specified therein. In the face of sub-section (4), introduced by the 1976 Amendment Act, there is hardly any room for importing the theory of implied repeal. Now coming to Section 54A, we have already indicated that the linkage between sub-section (1) and sub-sections (2) to (9) got snapped with 1964

Amendment itself, which not only deleted the words "and the following procedure shall be followed for the election of a Vice-President" but also expanded the second of the two conditions as adumberated hereinbefore The 1976 Amendment not only continued the said situation, but also added the words subject to the provisions of sub-section (4) of Section 54 at the inception of sub-section (2) These words, in our opinion have created a link between Section 54 and sub-sections (2) to (9) of Section 54A Sub-section (4) of Section 54 is continuation of sub-section (1) of Section 54 and by these words sub-sections (2) to (9) of Section 54A have become a continuation of sub-section (4) of Section 54 According to petitioners counsel of course, these opening words do not really create any such linkage According to them all they mean is that election of the Vice-President under sub-sections (2) to (9) — being the only procedure therefor — must be completed within the period of limitation prescribed under sub-section (4) of Section 54 We do not think that we can give effect to this interpretation If the Legislature wished to say that a Vice-President should be elected only and only in accordance with sub-sections (2) to (9) of Section 54A, what they ought to have done was to amend Section 54 suitably which they have not chosen to do Not only they did not do it, they reaffirmed the mode of election prescribed by sub-section (1) of Section 54 by inserting sub-section (4) in that Section The proper meaning to be given to the said opening words in sub-section (2) of Section 54A is to say that the provisions contained in sub-sections (2) to (9) are supplemental to and are in continuation of the provisions contained in Section 54 which means that if a Vice-President is not elected within a period of three months prescribed in Section 54(4), he must be got elected by the District Magistrate in accordance with the procedure prescribed under sub-sections (2) to (9) of Section 54A This interpretation in our opinion, harmonises the several provisions in both the sections and is also consistent with the language employed therein In our opinion, it also amounts to placing a reasonable construction upon the said provisions. We may in this connection recall the words of Holmes, J in Towne v Eisner (1917) 62 Law Ed 372 at p 376 The learned Judge said —

> "A word is not crystal, transparent and unchangeable It is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used

In fact, Judge Jerome Frank in his book Dias Jurisprudence, 4th Edition, at page 625 quoted Holmes J as saying —

> "We must think things, not words, or at least we must constantly translate our words into facts for which they stand if we are to keep to the real and to the true

It is keeping the said words in mind that we have approached the meaning of the said opening words in sub-section (2) of Section 54A We do not say that they are not capable of meaning something else They may well mean more than one thing, but what we have to see is which is the meaning which fits into the context and the scheme of the relevant provisions We have to and have adopted such a construction

19 We may now have a brief review of the cases decided with reference to Sections 54 and 54A. The first decision is an Lakshmi Narain Misra v Municipal Board, 1962 All LJ 113 The question considered in this special appeal was whether a Vice-President elected by a special resolution under sub-section (1) of Section 54 can be removed, before the expiry of his term by another resolution purporting to cancel the resolution electing him. It was held that such a course was not permissible in view of sub-section (2) which fixes his tenure In that connection certain observations which are relevant for our purpose were made It was observed

> "A Vice-President is elected by a special resolution under Section 54(1) and under sub-section (2) thereof his term of office is one year from the date of his election or the residue of the term of his office as a member

of the board whichever is less

some support for our view may be drawn from Sec 54A, sub-sec (1) of this section provides that where a person, on being elected President, fails or refuses to function or is otherwise not able to function and a Vice-President has not been elected, the District Magistrate shall exercise the powers of the President until a Vice-President is elected in accordance with the procedure laid down in the succeeding sub-sections. The procedure is that the District Magistrate shall call a meeting of the Municipal Board for the election of a Vice President under the presidentship of a stipendiary judicial officer Members shall elect the Vice-President, in case of equality of votes, the Judicial Officer shall decide by lot which of the candidates having equal votes is to be declared elected. The Judicial Officer shall declare the result of the election at the meeting We do not think that the Vice-President is elected by a resolution of the Municipal Board under Sec 54-A. The section provides a special procedure for electing a Vice-President otherwise than by a resolution The general power of the Municipal Board to cancel any resolution cannot therefore be invoked to cut down the term of office of a Vice-President elected under Sec 54-A If that is correct, as we think it to be then it is rather difficult to believe that the Legislature intended to empower the Municipal Board to cancel a resolution electing a person as Vice-President under Sec 54(1) We are reluctant to believe that the legislature intended to lay down a double standard one for the Vice-President elected under Sec 54 and the other for the Vice-President elected under Sec 54-A."

Of course, the Bench was considering Section 54-A as it was initially introduced by the amendment Act I of 1955

20. In Ballabh Das Agarwal v The District Magistrate, Ghazipur 1980 UPLBEC 266 the learned single Judge dealt with Sections 54 and 54A after the latter section was amended by amendment Act 27 of 1964 The learned Judge held that Section 54A even after it was amended in 1964 does not change the normal procedure for the election of Vice-President The normal mode of electing Vice-President the learned Judge held, is by special resolution as provided by Section 54(1) of the Act The learned Judge held further that the occasion for electing the Vice-President in the manner prescribed by sub-sections (2) to (9) of Section 54A arises only when the special contingency contemplated by sub-section (1) arises The following observations in the judgment are relevant —

"It does not appear that the intention of introducing Section 54A was to change the normal procedure for the election of a Vice-President Normal procedure for the election of Vice President is the election by a special resolution as provided by Section 54 of the Act Sections 87 and 88 of the Act provide for the requirement of a special resolution According to the proviso of Section 87 a prior notice of the intention to transact a business required to be transacted by special resolution has to be given According to Section 88, for a special resolution there has to be a quorum of not less than one half of the members of the Board Section 92(2) of the Act provides that in case of equality of votes, the President of the meeting shall have a second or casting vote The proviso of sub-section (2) of Section 88 provides for adjournment of a meeting

The procedure prescribed for election of a Vice-President in Section 54A(2) to (9) is different It provides for calling of a meeting by the District Magistrate It is to be presided over by a civil Judicial Officer and there is no provision for quorum or adjournment The purpose of giving authority to the District Magistrate to call a meeting and authorising the civil Judicial Officer to preside over the meeting appears to provide for the contingency contemplated by sub-section (1) of Section 54A. When there is no President available for acting as such and there is also no Vice-President able to function, the meeting has to be called by some one else and has to be presided over by some body else It is to provide for this contingency that the District Magistrate who has to take over on the contingency arising has been given power to call a meeting and to get it presided over by a civil Judicial Officer"

21 We may now refer to the Bench decision in Municipal Board Bachharawa, District Moradabad v Divisional Commissioner Moradabad, (1989) 2 UPLBEC 248 (1989 All LJ 1208) In this case the President had convened a meeting of the Board for electing a Vice-President on 23rd February 1989 On this fact being brought to the notice of the Commissioner, he directed that the election of the Vice-President shall not take place in the meeting so convened by the President since it has not been convened by the District Magistrate in accordance with the provisions of sub-section (2) of Section 54A The order of the Commissioner was questioned by the President of the Board before this Court The precise point canvassed before the Bench was whether by virtue of Section 54A as amended in 1964 and particulary in 1976 is there only one method of electing a Vice-President or whether there are two methods The argument of the petitioner before the Bench was that Section 54A did not do away with the normal mode of election of the Vice-President under Section 54(1) whereas the respondent's case was that Section 54A as amended by Amendment Act 41 of 1976, did away with the dual procedure and that the only procedure in accordance with which a Vice-President can be elected, whether the election is held soon after the Constitution of the Board or in the contingency contemplated by Section 54A(1) is the one prescribed by sub-sections (2) to (9) of Section 54A The Division Bench laid emphasis upon the words added by Amendment Act 41 of 1976 in sub-section (1) of Section 54A, viz , such officer shall be called the Administrator and accordingly the provisions of Section 10AA shall mutatis mutandis apply' and after referring to both provisions and the relevant amending acts held as follows (at Pp 1211 1212 of 1989 All LJ 1208) --

"The interpretation given by us to the status of a District Magistrate while exercising powers under sub-section (1) of Section 54A read with the provisions of Section 10AA leads to the inevitable conclusion that the procedure for holding the election of a Vice-President when an elected President is functioning and when an elected President is not functioning for any reason whatsoever or when there is a casual vacancy in the office of the President will be the same we are also not oblivious of the fact that the construction which we have given will immediately render the provisions of sub-section 54A redundant It is noteworthy that the Legislature while making the changes referred to above in sub-section (1) of Section 54A not only retained the provisions of sub-section (2) of Section 54A but also added some words opening that provision Therefore there can be no escape from the conclusion that the Legislature deliberately retained sub-section (2) of Section 54A It did so with an avowed object The object being to provide for a special procedure for the election of a Vice-President. Such a procedure has to be followed whenever an election of a Vice-President takes place and in whatever situation To put it differently such a procedure has to be followed in a situation where an elected President is available to convene and preside over a meeting to be held for electing a Vice-President and also in a situation where for one reason or the other an elected President is not able to function as a President or a casual vacancy has occurred in the office of the President We are therefore driven to the conclusion that by enacting U P Act No 41 of 1976 the Legislature did away altogether with the dual procedure for conducting the election of a Vice-President of a Board"

The Bench referred to the provisions contained in S 54, the introduction of sub-section (4) by Amendment Act No 41 of 1976 which also inserted the opening words "subject to the provisions of sub section (4) of S 54 at the inception of sub-section (2) of S 54A and held that these features also support the interpretation placed by them on the two provisions With great respect to the learned Judges constituting the bench and for the reasons mentioned herein before we are unable to agree with their view We do not see any necessity for adopting an interpretation which renders certain provisions of the Act otiose and redundant Both the provisions Ss 54 and 54A can be harmonised and can be given their respective areas of operation Indeed as pointed out by us above Amendment Act No 41 of 1976 which introduced sub-section (4) in S 54 strengthens the view that the normal mode of electing the Vice-President described in sub-section (1) of S 54 was positively affirmed instead of doing away with it We have also indicated the proper meaning of the opening words in sub-section (2) of Section 54A

22. For the above reasons, we answer question No 1, referred to us, in the following words within three months of the constitution of the Board as notified under S 56 or within three months from the date of occurrence of vacancy in the office of the Vice-President as the case may be the election of Vice-President has to take place in accordance with sub section (1) of S 54 and not in accordance with the procedure prescribed in sub-sections (2) to (9) of S 54A If however, the President fails or omits to have the Vice-President elected within the aforesaid period, the Vice-President has got to be elected in accordance with the procedure prescribed in sub-sections (2) to (9) of S 54-A Moreover even in a situation attracting the provisions contained in sub-section (1) of S 54A, i e in a situation where no Vice President has been elected in accordance, with the Act, a Vice-President has to be got elected in accordance with sub-sections (2) to (9) of S 54A We make it clear that mere failure of the President to get the Vice-President elected within a period of three months aforesaid does not by itself attract the action under S 54A(1) it only means that the Vice-President has got to be elected in accordance with sub-sections (2) to (9) of S 54A Sub-section (1) of S 54A is attracted only when two essential conditions (each of which contemplates more than one situation) are satisfied. We think it appropriate to make a further clarification in computing the period of three months prescribed in sub-section (4) of S 54 the period during which the election of Vice-President is stayed by a competent authority or court shall have to be excluded.

23 We may now take up the second question referred to us Indeed this question is practically answered by our answer to the first question It follows from our answer to the first question that after the expiry of three months the President cannot conduct the election of Vice-President under sub-section (1) of S 54 It has to be conducted only in accordance with the procedure prescribed by sub-sections (2) to (9) of S 54A and this has to be done as promptly as possible after the expiry of the three months period specified in S 54(4)

24 The writ petitions may be sent back ot the Division Bench for disposal in accordance with law

V N KHARE, J 25 I agree Nothing to add

R B MEHROTRA, J — **26.** I agree

Order accordingly

1991 ALL. L. J 922

VIRENDRA KUMAR, J

Wajid Ali Khan Petitioner v District Judge and others, Respondents

Writ Petition No 8562 of 1989, D/ 10-9 1990

(A) U P Municipalities Act (2 of 1916), S 19 — Election to office of Chairman of Municipal Board — Qualification of being not less than 30 years on date of filing nomination papers — Entry of date of birth in High School certificate carries weight — Decision on basis of unrebutted entry in certificate is legal

1981 All LJ 649, Followed

(Para 5)

(B) U P Municipalities Act (2 of 1916), S 19(1)(c) — Election to office of chairman of Municipal Board — Election challenged

on ground of disentitlement as to age — Disentitlement can be challenged in election petition — It would not be possible to produce all evidence at time of filing of nomination papers or at time of scrutiny thereof

Case law discussed

(Para 6)

Cases Referred Chronological	Paras
AIR 1984 SC 1911	7 10
1981 All LJ 649 W P No 535 of 1980, D/ 2 9 1980 (All) (Followed)	5
AIR 1977 SC 1992	7 9
AIR 1970 SC 340	7, 11
1959 All LJ 169 AIR 1959 All 357 (FB)	7 8

Mr S R Dwivedi, for Petitioner, CSC, Mr R N Gupta (O P No 2), for Respondent

ORDER — The petitioner seeks for quashing the judgment and order dated 27-9-89 passed by the District Judge, Hardoi setting aside the election of the petitioner to the office of the Chairman Nagar Palika, Sandila and directing the District Magistrate Hardoi not to hold fresh election for the same office in pursuance of the said judgment and order

2. The petitioner was elected as Chairman of the Nagar Palika Sandila in November 1988 His election to the said office was challenged by the opposite party No 2 Ganga Ram on the ground that the petitioner did not fulfil the requisite qualification of being not less than 30 years of age when he filed nomination papers on 17 10-1988 for the said office According to the petitioners, his date of birth was 1-8-1957 and as such he was about 32 years of age when he filed the nomination papers on 17-10-88 According to the opposite party No 2, the date of birth of the petitioner was 10-3-1959 and as such he was of 29 years 4 months and 21 days on the date of filing his nomination papers. In the election petition filed by the opposite party No 2, Ganga Ram against the election of the petitioner to the post of Chairman, the District Judge, Hardoi accepted the version of the opposite party No 2 and not of the petitioner and, therefore, held that the petitioner was not of 30 years of age at the time of filing his nomination papers for the said Office Consequently election of the petitioner to the office of the Chairman Nagar Palika Sandila was set aside by the District Judge Thereafter the District Magistrate Hardoi ordered for fresh election for the said office This writ petition has thus arisen

3. The crucial point is of the date of birth of the petitioner or in other words his age at the time of filing of the nomination papers by him on 17 10-1988 In this connection the petitioner as well as opposite party No 2 both have produced oral and documentary evidence during the course of the election petition before the District Judge The District Judge has framed clearcut issues in this connection and has well considered the evidence, both oral and documentary adduced by the parties. He has given cogent reasons for accepting the version of the opposite party No 2 and not of the petitioner in respect of the date of birth of the petitioner and on that basis in coming to the conclusion that the age of the petitioner was less than the minimum prescribed age of 30 years for the office of the Chairman at the time of filing the nomination papers on 17 10-1988 There is force and substance in the contention of the learned counsel for the opposite party No 2 that in such circumstance this Court in the exercise of its jurisdiction under Art 226 of the Constitution should not interfere with the findings and the judgment of the District Judge

4 Moreover even on examining the facts and circumstances of the case on merits, I find that the version of the opposite party No 2 and not of the petitioner is believable

5. From the side of the petitioner oral evidence of the petitioner himself as D W 1 and of his father Zahid Ali as D W 2 was adduced. The petitioner has also filed a number of papers. They included the electoral roll of 1984 in which the age of the petitioner was recorded as 28 years and the electoral roll of 1987 in which the age of the petitioner was recorded as 32 years, Copies of the register for death and birth as well as Pariwar register

were also filed In his deposition as D W 1 the petitioner has admitted that in the certificate of High School his date of birth is noted as 10-3-1959 though in his deposition he has sworn that his date of birth was dt 1 8-1957 Zahid Ali (D W 2) the father of the petitioner has also stated in his examination in-chief that the date of birth of the petitioner was 1-8-1957 but he was cross examined at lengh about the birth and age of his other sons and daughters and on careful examination of the same his testimony about the date of birth of the petitioner cannot be held to be acceptable The District Judge in his judgment has discussed in detail the testimony of Zahid Ali and has come to the same conclusion On the other hand, apart from the fact that the petitioner s age in the High School certificate was admittedly entered as 10-3-59 there has come on the record satisfactory material to make out the same There can be no doubt that the entry of the date of birth in the High School certificate carries weight and authenticity It stands unrebutted In the electoral roll of 1988 for the Assembly Constituency the age of the petitioner was recorded as 28 years From the side of the opposite party No 2, apart from the documents P W 1 Shyam Lal Dwivedi the Librarian of the I R Inter College Sandila in which the petitioner had studied as well as the opposite party No 2 himself as P W 2 were examined in the election petition case Shyam Lal Dwivedi had brought the relevant records of the College to prove that the date of birth of the petitioner was recorded as 10-3-1959 From the side of the opposite party No 2 reliance has been placed on the decision of writ petition No 535 of 1980 Narain Bux v State of U P (1981 All LJ 649) decided by a Division Bench of this Court on 2 9-1980, in which reliance was placed on the earlier decisions of the Hon ble Supreme Court and Privy Council The Division Bench has finally held that the date of birth recorded in the High School Examination or any equivalent examination shall be deemed to be the correct date of birth for the purposes of superannuation There is no reason not to give same weight and authenticity to the date of birth recorded in the High School certificate while determining the date of birth of a candidate for the post of Chairman Municipal Board

6 The contention of the learned Counsel for the petitioner that the opposite party No 2 having failed to raise objection about the date of birth given by the petitioner at the time of filing the nomination papers as well as at the time of scrutiny of nomination papers would debar the opposite party No 2 from raising such objection in the election petition, or will go to discredit the case of the opposite party No 2 about the age of the petitioner, carries no substance Age is a question of fact and generally requires proof It would have been hardly posible for the opposite party No 2 to collect and produce all evidence to rebut the age of the petitioner disclosed by the latter at the time of filing the nomination papers or at the time of scrutiny of the nomination papers Moreover under S 19(1)(C) of Municipalities Act, 1916 the question of disentitlement of the petitioner for the office of Chairman can be raised in the election petition as has been done by the opposite party No 2 by filing the election petition against the petitioner and taking up therein the question of age of the petitioner

7 The learned counsel for the petitioner has referred to the following cases —

1 Ghulam Mohiuddin v Election Tribunal for Town Area Sakit, AIR 1959 All 357 (1955 All LJ 163) (FB)

2 Nripendra Bahadur Singh v Jai Ram Verma, AIR 1977 SC 1992

3 Inderjit Barua etc etc v Election Commission of India, AIR 1984 SC 1911

4 Kabul Singh v Kundan Singh, AIR 1970 SC 340

8. In the case of Ghulam Mohiuddin (supra), the question was whether the names of certain persons should have been included in the electoral roll or not as the dispute was whether they were minors or whether they resided within the ward concerned The election was in respect of the Chairman of

the Town Area Committee The case was heard by Full Bench of three Judges and two Judges held that the order of the Election Tribunal holding that the electoral roll was not final and conclusive at the time of hearing the election petition was erroneous and must be quashed In the instant case, the question is quite different The question is not of preparing a wrong voter list, but of fulfilment of the requirements of age by a candidate who was contesting for the post of Chairman of the Municipal Board.

9 Similarly, in the case of Nripendra Bahadur Singh (supra) the question was whether some members were ceased to be members of Kshetriya Smiti but had wrongly continued in the electoral rolls and whether their participation in the election rendered the election illegal Such is not the point in the instant case

10. The case of Inderjit Barua (supra) was also about the correctness of the electoral rolls and whether it was complete

11 In the case of Kabul Singh (supra) it was held that the person whose name was included in the electoral roll on the last date of making nomination papers, is entitled to vote unless prohibited by any provision and that the finality of electoral roll cannot be challenged in a proceeding challenging the validity of election

12. So, these cases are of little avail to the petitioner for the obvious reasons that in the instant case the primary and basic question is not of electoral roll. The crucial point in the instant case is different It is about the petitioner's being eligible for the office of Chairman, Municipal Board on the basis of his age when he filed the nomination papers Consequently, these cases are of little avail to the petitioner

13. In the result, the writ petition having no merits is liable to fail. It is dismissed with cost.

Petition dismissed.

1991 ALL. L. J 925

= 1991 Cri. L. J 2357

R B MEHROTRA J

Major Ashok Kumar Singh, Petitioner v VIth Additional Sessions Judge Varanasi and others Respondents.

Civil Misc Writ No 706 of 1990, D/- 17 12 1990

(A) Criminal P C (1974), S. 125 — **Maintenance — Husband impotent qua his wife — Wife can live separately and claim maintenance on this ground.**

1981 Cri LJ 1430 (SC), Rel. on. (Para 9)

(B) **Criminal P C (1974), S. 125 — Maintenance — Wife an educated lady but unemployed — Maintenance cannot be refused merely because she is educated and capable of securing employment.**

(Para 12)

(C) **Constitution of India, Art. 226 — Practice and procedure — Members of Bar citing overruled decisions before Court — May result in obtaining wrong decisions — Members advised to be careful in future.**

(Para 11)

Cases Referred : Chronological	**Paras**
1981 Cri LJ 1430 AIR 1981 SC 1972	9, 11
AIR 1980 Kant 8	9
1978 (2) Cri LJ 1661 1978 All LJ 1002	5, 9
AIR 1966 All 150 1965 ALJ 453	5
1948 (49) Cri LJ 52 AIR 1948 Nagpur 69	5, 9
34 Cri LJ 951 AIR 1933 Mad 688	6 9

Sri Yogesh Agarwal, for Petitioner; S C., for Respondents.

ORDER — By means of this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the order of the II Munsif Magistrate, Varanasi, dated 8th of March, 1989 and the order of the IV Addl. Sessions Judge, Varanasi, dated 19th January, 1990 dismissing the petitioner s revision filed against the order of the II Munsif Magistrate Varanasi allowing the application of Smt. Geeta Singh, under S 125 of the Code of Criminal Procedure 1973

2. It is not disputed in the present case that Smt Geeta Singh was a legally wedded wife of the petitioner and the petitioner married Smt Geeta Singh on 22-11-1981 Thereafter Smt Geeta Singh stayed with the petitioner at Sultanpur and lived there for sometime and then returned to her parents house at Varanasi She again went to petitioner s house at Mhow (Madhya Pradesh) where the petitioner was posted as a Captain and lived with him for few months

3 The case of Smt. Geeta Singh, the wife of the petitioner who has been arrayed as respondent No 3 in the petition, is that the petitioner in the month of November, 1982 took her to her parents house and left there and thereafter she is not being maintained by her husband The petitioner's contention is that she is ready and willing to maintain respondent No 3 and keep her, but respondent No 3 refused to live with him and as such the application under Section 125 of the Code of Criminal Procedure is not maintainable The petitioner s contention is that he has already filed a suit for restitution of conjugal rights against respondent No 3 which is pending

4 Both the courts below have recorded a concurrent finding that the petitioner was impotent and was unable to perform sexual intercourse with his wife, namely, Smt. Geeta Singh The Courts below also held that respondent No 3 was justified in living separately from her husband on the ground that the husband of respondent No 3 is impotent and is unable to discharge his marital obligations and was also unable to have any sexual intercourse with her

5 The case of the petitioner before the trial Court as well as before this Court is that the petitioner is potent but respondent No 3 is abnormally oversexed and as such she is not sexually satisfied with the petitioner This case of the petitioner has, however been disbelieved by the courts below and concurrent findings of fact have been recorded by both the Courts below that the petitioner was impotent qua his present wife, namely, Smt Geeta Singh. In this regard the proposition of law is well settled that a person can be potent against a particular person but still be impotent against some other individual. In Jagdish Lal v Smt Shyama Madan, reported in AIR 1966 All 150 (1965 ALJ 453) Hon'ble Mr Justice Gangeshwar Prasad held as under (at page AIR (152) All) —

> Impotency means incapacity for accomplishing the act of sexual intercourse and by sexual intercourse, in this context is meant not an incipient partial or imperfect but a normal and complete coitus Impotency is to be distinguished from sterility which may in some cases accompany impotency but is not necessarily associated with it, the two expressions denoting lack of two different powers A person may be incapable of accomplishing the sexual act and yet be capable of procreating and, conversely too, a person may be incapable of procreating and yet be capable of accomplishing the sexual act The cause of impotency may be in the malformation or structural defect in the parts, in the functions, resulting in imperfect erection or premature ejaculation, in diseases whether local or general or in the mind, manifesting itself a repugnance for the sexual act fear, lack of confidence etc It may also happen that a person is capable of having sexual intercourse but incapable of performing it with a particular individual, and in such a case the person must be regarded as impotent in relation to that particular individual regardless of his potency in general. These matters are too well settled to need reference to any medico-legal or legal authorities ”

The only contention of the learned Counsel for the petitioner Sri Yogesh Agarwal, is that merely on the ground, that a husband is impotent, no maintenance can be awarded under Section 125 of the Code of Criminal

Procedure He has placed reliance on the following two decisions —

(i) AIR 1948 Nagpur 69 1948 (49) Cri LJ 52 Emperor v Daulat Raibhan

(ii) 1978 ALJ 1002 1978 Cri LJ Vol 2 1661 Bundoo v Smt. Mahrul Nisa

6 In the first case, Hon ble Mr Justice Hidayatullah as he then was held that a wife is not entitled to live separately from her husband and claim maintenance on the ground that her husband is impotent and unable to perform his marital duties In this decision, a decision of Madras High Court was relied upon which was reported in AIR 1933 Mad 688 34 Cri LJ 52

7 In the second case, Hon ble Mr Justice P N Bakshi, as he then was relying on the said decision of Hon ble Mr Justice Hidayatullah took the same view

8 On the basis of the aforesaid two decisions, Sri Yogesh Agarwal contended that if something happens which is beyond the control of a person then it cannot amount as an act of neglect by such a person Sri Agarwal further contended that if a husband becomes blind or suffers from some other diseases, the same cannot be a ground for a wife to live separately and also claim maintenance According to the petitioner s counsel impotency is like any other disease and as such merely on the ground that a husband is impotent, the wife cannot claim to live separately on this ground, and also claim maintenance under Section 125 of the Code of Criminal Procedure He laid stress that the opening words of Section 125 of the Code of Criminal Procedure clearly require some positive action on the part of a person, which can result in neglect or refusal to maintain the persons mentioned in Section 125 of the Code of Criminal Procedure. If a person not by his own act but due to something beyond his control is not in a position to perform some of his marital obligations then the other sex cannot claim maintenance under Section 125 of the Code of Criminal Procedure

9. All these arguments stand exploded by a decision of the Hon ble Supreme Court in Sirajmohmedkhan Janmohamadkhan v Hafizunnisa Yasinkhan reported in AIR 1981 SC 1972 (1981 Cri LJ 1430) In this decision, the decisions relied upon by Mr Yogesh Agarwal i.e AIR 1948 Nagpur 69 (1948-49 Cri LJ 52), 1978 ALJ 1002 (1978 (2) Cri LJ 1661) and AIR 1933 Mad 688 (34 Cri LJ 951) been specifically overruled and the contention of Sri Agarwal that unless by some positive act a person neglects or refused to maintain, Section 125 of the Code of Criminal Procedure cannot be invoked have also been rejected It has been held by the Hon ble Supreme Court that Hon ble Mr Justice Bakshi gave his decision since his attention was not drawn to the provisions of second proviso of Section 125 of the Code of Criminal Procedure which provides that the Magistrate may consider the grounds of refusal of the wife to live with her husband if the husband offers to maintain his wife and wife refused to live with him. In that view of the matter the Hon ble Supreme Court has held that the wife will be justified in refusing to live with an impotent husband and claim maintenance u/S 125 Cr P C In this decision, the Supreme Court has also approved the decision of the Karnataka High Court in Dr Srikant Rangacharya Adya v Smt Anuradha reported in AIR 1980 Kant 8, wherein it has been held that it is unthinkable in these days that the sexual weakness of the husband is of no consequence and, therefore, cannot amount to cruelty If a wife does not get proper sexual satisfaction it will lead to depression and frustration It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse

10. In view of this Supreme Court decision, the arguments advanced by Mr Yogesh Agarwal were not open to him

11 It is very unfortunate that this decision i.e , AIR 1981 SC 1972 (1981 Cri LJ 1430) of the Supreme Court was not cited at Bar on behalf of the counsel of either side It is also unfortunate that responsible members of the

Bar are citing overruled decisions which may also result in obtaining wrong judgments from the Court. It is expected that in future the members of the Bar will take care in citing decisions and will at least not cite overruled decisions

12. Sri Yogesh Agarwal, however, faintly also contended that since respondent No 3 was an educated lady, it cannot be said that she has no means to support herself because an educated lady can always get employment and can support herself. This contention has also no merits It is not disputed that respondent No 3 is not employed anywhere and has no other means to maintain herself, merely for the fact that a woman is educated, she cannot be deprived of her right to get maintenance under Section 125 of the Code of Criminal Procedure

13 No other point has been pressed before me by the counsel for the petitioner The quantum of amount of compensation has also not been challenged

14 I accordingly, dismiss the writ petition with costs, which I quantify, in the present case, to Rs. 2,000/-

Petition dismissed

1991 ALL. L. J 928

= 1991 Cr. L. J 2790

G K MATHUR AND G D DUBE, JJ

Ram Lakhan Sheo Charan and others, Appellants (in Jail) v State of U P, Respondents

Criminal Appeal No 954 of 1978, D/-27-3-1991

(A) Criminal P C. (2 of 1974), S. 164 — Statement of witnesses under — Not supporting prosecution story in Court — Cannot be used as substantive piece of evidence.

(Para 13)

(B) Criminal P C (2 of 1974), S. 386 — Appeal against conviction — Murder case — No evidence at all on basis of which it could be said that accused had actually committed crime — Conviction and sentence passed against accused persons set aside

Penal Code (45 of 1860), S 302 (Para 14)

Cases Referred Chronological	Paras
1960 Cri LJ 1167 1960 All LJ 642 AIR 1960 All 521	12
1950 Cri LJ 1004 AIR (37) 1950 HP 35	12
(1949) 50 Cri LJ 872 AIR 1949 PC 257 1949 All LJ 283	12
(1946) 47 Cri LJ 336 AIR 1946 PC 38	12
(1946) 47 Cri LJ 344 AIR 1946 PC 45 1946 All LJ 283	12
(1942) 43 Cri LJ 277 AIR 1942 Cal 36	12

Iqbal Narain Mulla, B P Gupta, R P Singh, for Appellant, D G A, for Respondent

JUDGMENT — This is an appeal against the judgment and order of First Additional Sessions Judge, Banda, convicting and sentencing each of the appellants to imprisonment for life u/S 302 read with S 149, IPC It is noteworthy that the lower court had held the appellants guilty of the offences punishable u/Ss 147, 148 and 109, IPC also, but no punishment was proposed under any one of these sections The appellants were sentenced only u/S 302 read with S 149, IPC

2 A report was lodged by constable Ragho Prasad of police station Karvi, district Banda at 11 00 a.m in the aforesaid police station that while on duty he reached old bus station and there he had been informed by people of the locality that the dead body was lying near well Hence he rushed to the spot and noticed the dead body On enquiry, he found that the dead body was of Deo Raj Singh It had several gun-shot wounds

3 A case was registered on the said report and the investigation was taken up by Janki Jiwan Misra (PW 5) Mahtab Singh, Sub Inspector had prepared inquest report of the dead body and sent it in a sealed covered to the mortuary for post mortem. He had inspected the site and prepared site plan He had interrogated Ragho Prasad (PW 1), Shri

Singh (PW 2) Gillari (PW 3) and Chabi Nath (PW 4) and thereafter submitted charge-sheet against the appellants

4 The prosecution story, as put forward by the prosecution, was that there was an enmity between Deo Raj Singh and the appellants It was alleged that in the murder of Natthu Singh (brother of appellant Pheran Singh) the deceased Deoraj Singh, his brother Shri Singh and three others were accused This Sessions Trial resulted into acquittal, Smt Shanta, sister of appellant Ram Lakhan had implicated Deoraj Singh and Shri Singh in a murder case of some hill area In this case also Deoraj Singh was acquitted, Deoraj Singh had lodged a report against Pheran Singh and others u/S 307, IPC in which they were also acquitted It was alleged that on account of the aforesaid enmity there was no relationship between the two parties On 26th January, 1972, Gillari, Chhabi Nath and Deoraj came to Karvi Nandlal and Bhuru Singh had also accompanied the aforesaid three Chhabi Nath was to get a litigation of his sister-in-law Smt Ramaiya settled Hence they stayed at the quarter of Ram Lakhan appellant who was residing in a Kothari within the premises of public works Department Smt Shanta, sister of Ram Lakhan went to see a movie along with her son Parasi and Smt Ramaiya At about 8 00 p m Deoraj, Gillari and Chhabi Nath were sitting on the Chabutra where Ram Lakhan was cooking his food At that time other appellants, namely, Sheo Kumar, Sheo Das, Ram Lal and Pheran Singh came Pheran Singh and Ram Das had gone Others had lathis They gagged Ramraj and dragged him forcibly At that time, Ram Lakhan exhorted them to kill him soon Thereafter, these persons had shot Deo Raj near the well The appellants have threatened the witnesses that if they disclosed this fact to anybody, then they would also be done to death Hence after return of Smt Ramaiya, the two witnesses hurried back to their houses

5 The prosecution examined Ragho Prasad (PW 1), Shri Singh (PW 2) Gillari (PW 3) and Chhabi Nath (PW 4) The appellants had pleaded not guilty to the charges They had alleged that they had been falsely implicated in this case They had not produced any witness in defence After appraisal of evidence the learned Judge found the appellants guilty of the offences punishable u/Ss 302, 147, 148 and 109 I P C

6 Out of four witnesses of fact, Ragho Prasad (PW 1) was a witness relating to the information about the presence of the dead body and his report regarding this dead body in the police station He has not stated any thing about actual killing by the appellants

7 Shri Singh (P W 2) had only stated about the previous enmity He had only stated that on return, Chhabi Nath and Gillari had informed him that they had stayed in the previous night at the residence of Ram Lakhan where he was murdered by the appellants His statement is not material about actual occurrence

8 Gillari (P W 3) and Chhabi Nath (P W 4) have not supported the prosecution story They only stated that they were staying at the residence of Ram Lakhan at Karvi They had seen that eight to ten persons had arrived at about 8 00 p m on the date of occurrence at the place of occurrence and dragged Deoraj forcibly and killed him outside the boundary of Public works department These witnesses were declared hostile and cross-examined by the prosecution. Only their statements made before the Magistrate u/S 164, Cr P C were put to them They had stated that they had given these statements on the asking of the police It was not their voluntary statement

9 Learned counsel for the appellants urged that there was no evidence at all to entail conviction of the appellants There was no justification for holding the appellants guilty u/S 302, IPC on the basis of the statements made u/S 164 of the Code of Criminal Procedure (hereinafter referred to as the Code)

10 We have heard learned A.G A. also

11 We are surprised that the learned Sessions Judge, little realizing the value of the

statements u/S 164 of the Code, had placed implicit reliance on these statements and held the appellants guilty The statements of Chhabi Nath and Gillari (Exts Ka-15 and Ka-16) respectively were recorded by S D M , Karvi on 8-2-1972 On that date, the old Code of Criminal Procedure was in force

12 The trial was held when the new Code of Criminal Procedure had come into force The wordings of S 164 in the new and old Code of Criminal Procedure with little changes are the same As early as in Manik Gazi v Emperor AIR 1942 Cal 36 (1942) 43 Cri LJ 277 a Division Bench of the Calcutta High Court had held that the statements u/S 164 of the Code can be used only to corroborate or contradict the statements made u/Ss 145 and 157 of the Indian Evidence Act In Brij Bhushan Singh v Emperor, AIR 1946 PC 38 and in Mamand v Emperor, AIR 1946 PC 45 (1946) 47 Cri LJ 344 the Privy Council had observed that the statement u/S 164 of the Code cannot be used as a substantive evidence and which can only be used to contradict and corroborate the statement of a witness given in the Court Similar observations, as made in the two cases below, were made by the Privy Council, in Bhuboni Sahu v King, AIR 1949 PC 257 (1949) 50 Cri LJ 872) and in Bhagi v Crown, 1950 Cri LJ 1004 (AIR 1950 HP 35) It was also held by a single Bench of the Himachal Pradesh Judicial Commissioner's court that statement u/S 164 of Code cannot be used as a substantive piece of evidence In State v Hotey Khan, 1960 ALJ 642 (1960 Cri LJ 1167) A Division Bench of this Court had also observed that statements u/S 164 of the Code cannot be used as a substantive evidence

13 The above catena of cases goes to show that where the witnesses do not support the prosecution story in the Court, then their statements u/S 164 of the Code cannot be used as substantive piece of evidence In this case, the learned Judge had erred in using Exts Ka-15 and Ka-16 as substantive piece of evidence

14 There was no evidence at all on the basis of which the learned Sessions Judge could come to the conclusion that the appellants had actually committed the crime The lower court ought to have acquitted all the appellants

15 In this case, a report has been received from Chief Judicial Magistrate, Banda that appellants Ram Lal and Pheran Singh are dead The appeal of appellants Ram Lal and Pheran Singh abates The appeal of other three appellants are allowed The judgment and order of the lower court are set aside The appellants are acquitted of the charges levelled against them They are on bail They need not surrender Their bail bonds are cancelled and sureties discharged

Appeal allowed

1991 ALL L J 930

= 1991 Cri L J 2815

H C MITAL AND K NARAYAN JJ

Harish Chandra and another etc , Appellants v State of U P , Respondent

Criminal Appeals Nos 1476 and 1583 of 1980, D/- 22-2-1991 *

(A) Evidence Act (1872), S 114 — Adverse inference — Non-production of documentary evidence even when it was available — Adverse presumption that if produced would have been derogatory, can be drawn

When a fact is alleged by the prosecution it needs proof and failure in respect of it, would injure the case of the prosecution Therefore, non-production of documentary evidence when it could be and was bound to be available, would give rise to an adverse presumption that if it was produced, it would have been derogatory for the case of prosecution (Para 8)

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*Against order of J M Srivastava, 4th Addl Sessions Judge, Fatehpur, D/- 21-6-1980

(B) Evidence Act (1872), S 3 — 'Disproved' — Prosecution making many allegations — Failure to prove them — Would give rise to a situation disproved

Making no allegation is something different as every fact cannot be known to the prosecution but making a lot of allegations and inability to prove them would give rise to a situation that the prosecution was not coming up with clean hands It would not be a mere case of not proved but a situation 'disproved (Para 9)

(C) Penal Code (1860), S 300 — Murder — Benefit of doubt — Reason given of presence of alleged eye-witnesses at place of occurrence was doubtful — Disparity between medical evidence and version of eye witnesses — Accused entitled to benefit of doubt

Evidence Act (1872), S 3
(Paras 9, 10, 14, 15)

R B Sahai, for Appellants. Dy Government Advocate, for Respondent

K NARAYAN, J — One Ram Lakhan Singh son of Manohar Singh was murdered in the evening of 26-7-1978 at about 7 p m in village Semauri P S Sultanpur Ghosh, District Fatehpur and at the same time, his gun and cartridges were also taken away by the miscreants A first information report in respect of the occurrence was lodged at the police station Sultanpur Ghosh at about 20 30 p m , the distance being 3 km The F I R was lodged by the brother of the deceased against Hukum Singh, Harish Chandra Singh, Ghanshyam Singh and Bhola They were tried after necessary investigation and submission of the charge-sheet and found guilty of the offence under Ss 302/34 and 394, I P C and were sentenced to imprisonment for life and 4 years R I under two counts by the judgment and order dated 21-6-1980 delivered by the IV Additional Sessions Judge, Fatehpur in S T No 170 of 1979 Aggrieved, by the conviction and sentence both they have come in appeal before this Court

2 The prosecution story in brief was that in the evening of 26-7-1978, Sri Ram Naresh Singh the brother of the deceased Ram Lakhan and Shatrughan Singh the son of the deceased were coming back to their home along with cattle that they had taken for grazing The deceased Ram Lakhan Singh was behind the cattle on his horse When the deceased was at the turn before the cattle shed of Sheo Lochan and Trilochan Pal and the witnesses were already some 25 steps ahead of him towards the North there were two fires from behind Ram Lakhan Singh, thereupon he cried and the horse came running in front of the house of Mahabali Teli where Ram Lakhan Singh fell from the horse back Hukum Singh, Harish Chandra Singh, Ghanshyam Singh and Bhola emerged from the house or cattle shed of Sheo Lochan and came to Ram Lakhan Singh Both Bhola and Hukum Singh held guns and Harish Chandra Singh and Ghanshyam Singh Kattas They all fired once each upon Ram Lakhan Singh killing him on the spot The occurrence according to the F I R was also seen by Jhuri son of Chauba. However none could go near the accused and the accused took away the gun and bandolier with 25 cartridges The F I R also narrated that Hukum Singh used to claim a well situated in plot No 714 which plot and well belong to the deceased and Ram Naresh Singh and for this reason, there was a bad blood between the two which had resulted in proceedings under S 107, Cr P C , though the same was compromised about an year back The body of the deceased was taken to home over a cot and thereafter the F I R was sent to the police station

3 The investigation proceeded with a visit of the Sub-Inspector of police to the house and that spot etc At house lion cloth and sacred thread of the deceased were taken in possession and blood stained and plain earth were also taken in police possession on the next day The body of the deceased was sent for post-mortem examination which was conducted by (P W 6) Dr B K Agarwal

4 The prosecution examined (P W 1) Ram Naresh Singh the informant and also

the brother of the deceased (P W 2) Shatrughan Singh, son of the deceased and (P W 4) Jhuri as the witness of occurrence The other witnesses were (P W 3) Rang Pal Singh the scribe of the F I R (P W 5) Chhotey Lal Shukla who had been Head Moharrir in July, 1978 and had prepared the chik report Dr B K Agarwal (P W 6) had conducted the post-mortem examination and (P W 7) Kripa Shanker Pathak had investigated the case

5 After considering the above-said evidence, the trial court recorded a finding of conviction

6 Before us, the learned counsel for the appellants has assailed the judgment of the trial court on various grounds, mainly with the contention that the presence of the witnesses at the spot is not natural and should be looked upon with an eye of doubt The line of cross-examination it seems, had also been directed to show and make out that the deceased was a man of questionable character had many enemies and the motive suggested for the accused persons was itself ill-founded The report of the post-mortem examination as well as the evidence of (P W 6) Dr B K Agarwal was also assailed to show that there was no proper examination and the evidence was not worthy of reliance

7 We will first take up the motive part Needless to say that the motive is always a double edged sword, as it can be a reason for crime and at the same time a reason for false prosecution specially when the motives alleged are of ill-will and bad blood However, here, where the position is a bit conflicting, as we shall mention below, these ordinary principles become less effective Here the position is that according to the prosecution case the accused had a motive and the evidence does not make it out The situation would thus obtain in a different manner

8 (P W 1) Ram Naresh Singh and (P W 2) Satrughan Singh are the only male members of the family of Ram Lakhan Singh now left alive, Ram Naresh Singh being the elder had taken burden of stating about the facts which could form the cause or motive of murder The primary reason was based on the ground that the accused Hukum Singh claims the well situate in plot No 714 It may also be mentioned that Hukum Singh, Harish Chandra Singh and Ghanshyam Singh are sons of Lok Pal Singh, Jagat Pal Singh and Rudra Pal Singh respectively who had been real brothers being sons of Nand Lal Singh One more brother Dharam Pal Singh was also shown but that is immaterial In this way, a claim made by Hukum Singh was relied upon to be a claim of all but the fact is otherwise Hukum Singh, when he was put this claim about the well in question in plot No 714 has denied to have ever made such a claim Bhola obviously said that he did not know about it and no other accused made any claim This could have been brushed aside as an effort of the accused to save their skin, but even the statement of (P W 1) Ram Naresh Singh in this behalf simply indicates that this was being put to create some sort of motive, it was admitted by him that the accused do not belong to his family and the well in question was situated in his ancestral land There has been never any litigation about the well He has also admitted that he had installed his tubewell and engine in this well some three years before and the accused persons had never objected to it This story about the well, therefore, is unfounded The other enmity is said to be in the form a proceeding under Section 107, Cr P C This too was not well made out Obviously there has been a proceeding but the statement of Ram Naresh Singh was that Ram Lakhan Singh was in one party and in the other party were the accused and Bhola A little before this statement in the cross-examination, the examination in chief itself he had mentioned this proceeding to be with Lal Bahadur Singh and Bhola having been with Lal Bahadur Though these proceedings are said to have been with respect to the dispute over the well, yet the copy of the application or report was not produced and this omission gains more weight to draw the prosecution case in view of the statement of a contradictory statement about party It may be true that motive part is not very weighty evidence but what type of evidence is required

for proof of fact has to be complied with and it cannot be given up by saying that it was unimportant and, therefore insufficient evidence was led When a fact is alleged it needs proof and failure in respect of it would injure the case of the prosecution Non production of documentary evidence when it could be and was bound to be available would give rise to an adverse presumption that if it was produced, it would have been derogatory for the case of prosecution (P W 1) Ram Naresh Singh was specifically asked if there was any ill-will between Ram Lakhan Singh and the accused after the compromise in proceedings under S 107, Cr P C which he had already said were done with a free will and he stated that there was no reason of ill-will during this period He had also stated that he was stating of the ill-will between the deceased and Hukum Singh on the ground that Hukum Singh had murdered Ram Lakhan Singh This would give rise to a state of mind with Ram Naresh Singh that till the death of Ram Lakhan Singh he had no grievance or fear or ill-will with these accused persons but this would not be an agreement with his statement about the date of occurrence It is that a little before in the evening, he had seen the accused and their sight had given him an impression of danger for life of Ram Lakhan Singh The situation being self contradictory would only indicate that the witness is not stating about his own feelings freely and honestly

9 We will again revert to the situation of absence of motive It may be that if there is a direct testimony, the absence of motive may not weigh much but where there is an allegation of motive and failure thereof, it may partially fail the case of prosecution Making no allegation is something different as every fact cannot be known to the prosecution but making a lot of allegation and inability to prove would give rise to a situation that the prosecution is not coming up with clean hands It would not be a mere case of not proved but a situation disproved

10 The next argument advanced on behalf of the appellants has been based on the probability of the presence of these two witnesses In this behalf it would be highly improbable that all the male members of the family would go to graze the cattle when the status of the person is said that they are cultivators of 50 bighas of land, Pradhan of the village and having near about 25 heads of cattle This being only a generalisation may not be of much use in solitary manner but this aspect has to be considered with several parts of statement of (P W 1) Ram Naresh Singh and (P W 2) Shatrughan Singh According to (P W 1) Ram Naresh Singh, the cows of the family are taken for grazing by the Charwaha and buffaloes are taken by the members of the family while (P W 2) Shatrughan Singh stated that they had not been giving cattle to any Charwaha [illegible] formerly some six months before the occurrence they had a servant Sita Ram who used to take 4 oxen and six buffaloes and two calves for grazing It is strange that oxen are to be taken for grazing rather on regular basis which is usual for cows as during the day oxen are usually kept busy in the fields and that labour is enough for them Occasionally one may take out his ox for grazing when they are free but taking them out for this purpose on regular basis cannot be expected (P W 2) Satrughan Singh had also denied if his cattle were ever taken by any Charwaha in NAR (herd) though according to (P W 1) Ram Naresh Singh, it was so done in respect of the cows It is true that Satrughan Singh is a student but taking all the cattle by Charwaha is a regular feature and is always known to every member of the family This story of presence of these two witnesses at the time of occurrence with the pretext of attending upon the cattle seems to be a lame excuse

11 The other witness, namely, (P W 4) Jhuri can also not be said to be a reliable person The observations recorded by the trial court indicate that he is a man of very low intelligence This is not a disqualification as nobody can improve upon it but then he can be said to be a partisan witness right under the thumb of Ram Naresh Singh His son Goverdhan was prosecuted for having assaulted one Sheo Raj and Harish Chandra

accused here was a witness for prosecution while the case ended in conviction Ram Naresh Singh and Satrughan Singh are two sureties for his son His evidence should have been considered with these aspects in mind It is true that every witness has interest in one party or the other and may not always be thrown away but his evidence is to be read with caution and in the instant case the evidence of Jhuri (P W 4) was too much unnatural Possibly he did not know anything beyond what he was given to understand According to (P W 1) Ram Naresh Singh be was coming back with his cattle while Jhuri has stated that he had already tethered them and was going to answer the call of nature If his cattle were present there, they could not be missed The statement of Ram Naresh Singh thus creates an impression that neither he nor Jhuri were present at the time of occurrence Jhuri has nowhere stated about his house or location of himself at the time of incident On the other hand it has been stated by Ram Naresh Singh that his house is situated towards the North and the pond of the village is shown towards the South Assuming for the time being the position could be that Jhuri was coming behind the deceased from the direction of the East as shown in the site plan The situation thus would be that he would be in a position to see the accused right at the cattle shed of Sheo Lochan, but his statement is not to that effect Even that would be the situation if he was coming after attending the call of nature which too has not been stated by him

12 An eye upon the site plan Ext Ka-8 shows that there are houses of Mahadeo Bhangi, Mahadevi Bhangi, Sunder and several others A fire of a gun is not a secret and anybody in village would peep out of his window at least to know as to what is happening With such a situation the absence of any witness of the locality would speak in volumes

13 We may also mention before concluding that the report of the post mortem examination prepared by (P W 6) Dr B K Agarwal was vehemently assailed by the learned counsel for the appellants and the arguments in this behalf were not without foundation Injury No 3 was changed from one of exit to that of entry, not merely by making mention thereof from everted to inverted margins only but changing the absence of blackening and tatooing to presence thereof Though much is not going to turn upon it in view of what has been stated above but alteration from absence to presence of blackening and tatooing does indicate that possibly the Medical Officer was not looking to the body himself

14 Apart from the above weakness in the report itself it was made out in the cross-examination of Dr B K Agarwal that the injury could have also been caused by a minimum of three shots Where possibilities are both i e injuries caused by three shots or 6 the eye witness account is not to be thrown out for the probability but in view of the above said facts relating to the oral evidence, this change may also be for other reasons and for this the benefit should go to the accused-appellants

15 In view of the above observations eye witness account was open to all doubts and for that matter the appellants should have been given benefit and acquitted of the charges This appeal therefore, should succeed

16 The appeal is allowed The conviction and sentence recorded by the trial court are hereby set aside The appellants are on bail They need not surrender Their bails and bonds are cancelled and sureties shall stand discharged

Appeal allowed

1991 ALL L J 935

= 1991 Cri L J 2834

S K DHAON AND S K MOOKERJI, JJ

Laxman Pd Agarwal Petitioner v K P Singh and others, Respondents

And

Sayed Mohd Karim and another, Petitioners v Laxman Pd Agarwal Respondents

C M W Ps Nos 15962 and 15963 of 1990 and 5350 of 1991 and Contempt Petn No 636 of 1990 D/- 18-4-1991

(A) **Contempt of Courts Act (70 of 1971), S 2(b) — Civil contempt — Wilful disobedience of Court's order — Contemner — President of Municipal Board — Filing two petitions — First challenging notice of resolution of no-confidence and second challenging resolution of no-confidence — Interim orders passed in both petitions suspending operation of no-confidence resolution — However interim order in first petition in addition placing restrictions as regards financial powers — Such restrictions whether inoperative as being passed in infructuous petition — President whether guilty of contempt**

The contemner is the duly elected President of a Municipal Board A notice of meeting to consider resolution of no-confidence against the President was issued to him The contemnor filed a writ petition against the notice The principal prayer claimed in the petition was that the aforesaid notice issued by the District Magistrate may be quashed The prayer may in the application for interim relief was that the order of the District Magistrate convening a meeting of the Board to consider the motion of no-confidence may be stayed during the pendency of the petition No order was passed in this petition till the date of meeting fixed in the notice The meeting took place on the date fixed in notice The resolution of no-confidence came to be passed Second writ petition was filed by the contemner against the resolution of no-confidence Interim order suspending the operation of no confidence resolution came to be passed Subsequently interim order was also passed in the earlier writ petition The interim order stayed the operation of the motion of no-confidence if any passed against the President-contemner allowed the contemnor to continue to act as President but placed restriction on his financial power namely that he should not sanction or pass orders regarding financial matters exceeding Rs 1000/- Contempt petition was filed against the President as he despite restrictions sanctioned payments above Rs 1000/- It was pleaded by the contemner that the interim order which placed restrictions on his financial power was inoperative having been passed in a writ petition which had become infructuous after the meeting had been held and resolution had been passed The contemner also claimed that he was acting as full-fledged President in view of the other interim order

Held that the Court while passing the interim order in writ petition challenging the notice of meeting was aware that the meeting of the Board must have taken place and therefore, in order to safeguard the interest of the contemner-President and to keep alive the said writ petition passed the order The Court could dismiss the writ petition after the meeting was held with the liberty to Contemner-President to file a fresh petition It could also keep it alive by passing an appropriate interim order therein The Contemner-President could have challenged the legality of the decision of the Presiding Officer that the motion of no-confidence had been passed in the writ petition by seeking an amendment of the writ petition Indisputably the interim order could be passed prior to date of meeting Yet it could not be possibly urged that the writ petition became infructuous The President-Contemner too did not consider the interim order placing financial restrictions on him either as infructuous or ineffective or having been passed without jurisdiction otherwise there was no necessity to file an application to get it dismissed as not pressed The plea that the writ petition challenging the notice of meeting had become infructuous on or after the date of meeting and the interim order passed in that petition after that date was an ineffective one was neither genuine nor bona fide (Paras 15, 16)

The plea that countersigning of cheques by President did not amount to sanctioning the payment is also not tenable (Para 18)

The contemner has neither averred nor proved that he was, in fact, under a misapprehension as to the scope of the interim order the stand taken is that irrespective of the order placing restrictions on him he was entitled to function as the President of the Board without any restriction whatsoever on the basis of the order passed in the second writ petition (Para 19)

The plea that the contemner acted as per legal advice has no legs to stand as neither affidavit of the legal adviser has been filed nor even his name was disclosed The contemner was therefore guilty of wilfully disobeying the Court's order (Paras 17, 22, 23 24)

(B) Contempt of Courts Act (70 of 1971), S 2(b) — Civil contempt — Disobedience of Court's order — Plea that contemner acted as per legal advice — Affidavit of legal adviser must be filed (Para 17)

(C) U P Municipalities Act (2 of 1916), Ss 50, 51, 296 — President of Municipal Board — Financial powers — Countersigning of cheque by President under R 5 — Amounts to sanctioning of payment

Municipal Account Code, Rr 5, 99 (Para 18)

(D) Contempt of Courts Act (70 of 1971), Ss 13, 2(c)(ii)(iii) — Words "due course of justice" in S 13 — Wider in import than words "due course of any judicial proceeding" or "administration of justice" used in sub-cl (ii) or (iii) of S 2(c) — Contemner by showing disregard to order of Court undermining its prestige — Not entitled to protection under S 13 (Para 24)

(E) Contempt of Courts Act (70 of 1971), Ss 2(c), 12 — Punishment — Contemner disregarding interim order passed by Court —Apology tendered not unconditional and bona fide — As yet sentence of fine of Rs 1,000/- only imposed (Paras 25, 26)

(F) Constitution of India, Art 226 — Equitable jurisdiction — Relief under — Can be refused if conduct of petitioner is offensive or unconscientious

As equitable remedies are at the discretion of the Court the Court before granting one will inquire whether the conduct of the party seeking the remedy in the matter before it has been conscientious If the conduct be offensive it would be a sound exercise of discretion to deny the relief Misconduct need not be punishable as a crime Any wilful act in regard to a matter in litigation which would be considered wrongful by honest and fair minded men will be sufficient to make the hands of the applicant unclean so as to deprive him of equitable relief

(Para 31)

(G) U P Municipalities Act (2 of 1916), S 48(3) — President of Municipal Board — Suspension — Order not disclosing the precise reason for suspension — Order merely referring to sub-sec (3) of S 48 — Clear case of non-application of mind — Liable to be set aside (Para 34)

G N Chandra, for Petitioner Standing Counsel and M Z Khan for Respondents

S K DHAON, J — These four petitions are inter-related They relate to the office of the President of the Municipal Board, Moradabad (hereinafter referred to as the Board) In the three writ petitions Sri Lakshman Prasad Agarwal (hereinafter referred to as Shri Agarwal), who claims himself to be the duly elected President of the Board is the petitioner In the contempt case Sri Agarwal is the sole opposite party, and the allegation is that he has wilfully disobeyed the interim order passed by this Court in Writ Petition No 15963 of 1990 which was passed at his instance It will be convenient to dispose of the three writ petitions and the contempt petition by a common judgment

2 On 26th May, 1990 the District Magistrate Moradabad issued a notice stating therein that a meeting of the Board will be held in the office of the Board on 4th June, 1990 at 11 00 a m to be presided over by Sri K P Singh, Civil Judge, Moradabad, to consider the motion of no-confidence against the President of the Board This notice was addressed to Sri Agarwal and 47 other persons who were considered by the District Magistrate to be the members of the Board

3 On 29th May, 1990 Writ Petition No 1593 of 1990 was presented by and on behalf of Sri Agarwal in this Court along with an application for interim relief The principal prayer claimed in the petition was that the aforesaid notice issued by the District Magistrate may be quashed The prayer made in the application for interim relief was that the order of the District Magistrate convening a meeting of the Board to consider the motion of no-confidence on 4th June 1990 may be stayed during the pendency of the petition As the said petition was presented during the vacations it was entertained by a learned single Judge The order-sheet indicates that on 29th May 1990, the learned Judge directed that the petition be put up before him on 30th May 1990 as unlisted The order-sheet of 1st June, 1990, indicates that on that date the learned Judge reserved his orders

4 On 4th June, 1990, the motion of no-confidence was considered and put to vote The Presiding Officer (Civil Judge Moradabad) declared that the motion had been duly carried On 6th June, 1990 Writ Petition No 15962 of 1990 was presented in this Court by and on behalf of Sri Agarwal and on that date another learned single Judge admitted the writ petition and passed an interim order to the following effect

"Issue notice

Until order otherwise the operation of the impugned resolution of no-confidence dated 4th June, 1990, passed against the petitioner shall remain suspended "

5 On 8th June, 1990 the learned Judge who had heard Writ Petition No 15963 of 1990 and had reserved his orders thereon on 1st June 1990, passed an interim order in the following words —

"After having considered the arguments raised by the learned counsel for the parties, I am of the opinion that until further orders of the Court, in case the motion of no-confidence has been passed against the petitioner, the same shall not be given effect to However it is ordered that the petitioner may continue to function as Chairman in case the motion of no-confidence has been passed but he shall not sanction or pass orders regarding financial matters exceeding Rs 1 000/-

The aforequoted order was pronounced by another learned single Judge on 8th June 1990 in accordance with Chapter VII R 1(3) of the Rules of the Court It is pertinent to note that a certified copy of the aforequoted order was obtained by and on behalf of Sri Agarwal on 8th June 1990 itself

6 On 11th July 1990 an application dated 9th July 1990 was filed by and on behalf of Sri Agarwal in Writ Petition No 15963 of 1990 before a Division Bench of this Court praying that the stay application be dismissed as having become infructuous and the stay order dated 8th June 1990 be vacated The Division Bench directed this application to be listed with previous papers in the week commencing 30th July, 1990 However the application was disposed of on 18th July 1990 This Court recorded the statement of the counsel for Shri Agarwal that the stay application had become infructuous and be dismissed as not pressed Accordingly this Court dismissed the application for stay as not pressed

7 On 8th August 1990 Contempt Application No 636 of 1990 was presented in this Court by two persons alleging themselves to be the members of the Board with the allegation that Sri Agarwal had between 9th June and 17th July 1990 issued innumerable cheques of diverse amounts exceeding Rs 1000/- On 10th August, 1990, a learned

Judge issued notice to Sri Agarwal in the contempt proceedings

8 On 2nd February, 1991 the State Government in the purported exercise of powers under sub-sec (2) of S 48 of the U P Municipalities Act 1916 (hereinafter referred to as the Act) issued a notice to Sri Agarwal and called upon him to show cause as to why he should not be removed from the office of the President of the Board By an order of the same date, purported to have been passed under sub-sec (3) of S 48 it placed Sri Agarwal under suspension On 23rd February 1991 the District Magistrate, Moradabad passed an order directing Sri Agarwal to hand over the charge of the office of the President to the Senior Vice-President of the Board On 26th February 1991 Writ Petition No 5350 of 1991 was presented in this Court by and on behalf of Sri Agarwal with the prayer that the order of suspension and the order calling upon him to hand over the charge of the office of the President may be quashed A direction was also sought against the respondents not to remove him (Sri Agarwal) from the office of the President On 27th February 1991 this Court granted time to the parties to exchange their respective affidavit and directed that the writ petition should be listed for admission along with Writ Petitions Nos 15962 and 15963 of 1990 on 1st April 1991 and on that day all the writ petitions were to be disposed of finally This Court also passed an interim order to the following effect

> Meanwhile we suspend the operation of the order dated 22nd February, 1991 passed by the State Government suspending the petitioner as President of the Municipal Board Moradabad The learned counsel appearing for the respondent stated that the newly added respondent had taken over charge as Acting President of the Board If it is so we direct that he shall forthwith hand over the charge to the petitioner This interim order shall continue for a period of five weeks from today It is directed that the petitioner shall not draw the amount of more than Rs 1000/- So far as the payment of salary to the employees is concerned same shall be disbursed by the District Magistrate It is further directed that the proceedings for removal of the petitioner before the State Government shall continue and it will be open to the respondents to pass appropriate order In case any order of removal is passed this order shall cease to be effective "

9 On 1st April 1991 Writ Petitions Nos 5350 of 1991, 15962 of 1990 and 15963 of 1990 were listed before us We commenced hearing in them on that date On 2nd April, 1991 we expressed the view that, while dealing with the submission of the contesting respondents that the conduct of Sri Agarwal disentitled him to a discretionary relief under Art 226 of the Constitution, we may have to record a finding which may have some bearing upon the merits of the contempt petition Thereupon counsel for the parties made a joint request that the contempt petition may also be heard and disposed of by us We asked them to make a joint application in that behalf That was done on 3rd April, 1991 Even Sri Agarwal made an endorsement on the said application that he had no objection to the contempt petition being heard and disposed of by us

10 We propose to deal with the contempt petition first We have already extracted above the interim order dated 6th June, 1990 passed in Writ Petition No 15962 of 1990 and the interim order dated 8th June, 1990 passed in Writ Petition No 15963 of 1990 It is admitted by Sri Agarwal that between 9th June, 1990 and 17th July, 1990 he countersigned no less than 75 cheques on the Punjab and Sindh Bank of diverse amounts exceeding Rs 1,000/- It appears that the cheque of the lowest amount was of Rs 1 040/- and that of the highest amount was of Rupees 3,53,618 36 p The total amount for which the cheques were issued by Sri Agarwal was Rs 34,48,741 51 P

11 The material averments made by Sri Agarwal in his counter-affidavit in the contempt proceedings are these He has highest regard for the orders of the law Courts and can never even think of violating any order of

this Court Notwithstanding the reply given, he tenders unqualified apology if ultimately he is found guilty of any inadvertent act or omission constituting violation of any order of this Court In view of the prayers made in Writ Petition No 15963 of 1990 and the prayer contained in the application for interim relief in that petition and in view of the fact that the meeting of the Board had taken place on 4th June, 1990 and a motion of no-confidence had been passed therein, Writ Petition No 15963 of 1990 had become infructuous as the cause of action for filing the said petition ceased After Writ Petition No 15962 of 1990 had been admitted and the operation of the resolution dated 4th June, 1990 had been stayed on 6th June, 1990, by this Court, he continued to function and discharge his duties as before Under the law, after the interim order dated 6th June, 1990, he was entitled to function as full-fledged President of the Board without any condition whatsoever He in accordance with the legal advice continued to discharge the duties of the President of the Board as provided in the Act As no orders were passed in Writ Petition No 15963 of 1990 on or before 4th June 1990, that petition had become infructuous, and in those circumstances "it was not advisable to state about the filing of Writ Petition No 15963 of 1990 while moving Writ Petition No 15962 of 1990 on 6-6-1990" According to law and as per the legal advice to him, the order passed by this Court on 6th June, 1990, being unqualified and without any condition, was to remain in force unless modified or vacated As the cause of action for filing Writ Petition No 15963 of 1990 came to an end on 4th June, 1990, that petition became infructuous and the order passed therein was inoperative Under the law he is entitled to function without any condition or restriction financially or otherwise However, at the first opportunity, on 18th July, 1990, Writ Petition No 15963 of 1990, on the statement of his counsel, was dismissed as not pressed (wrongly averred) There was no question of the disobedience of the order dated 8th June, 1990 as he was discharging his duties and functions on the basis of the order dated 6th June, 1990 No case of wilful disobedience is made out against him The contempt petition has been filed to harass him In spite of the facts and circumstances mentioned in the counter-affidavit he tenders his unconditional and unqualified apology

12 On 4th April, 1991, when arguments in contempt petition were resumed an application was moved by and on behalf of Sri Agarwal praying that the supplementary counter-affidavit accompanying it may be accepted and be brought on record We accepted the application and passed an order thereon that we shall take into account the averments made in the supplementary counter-affidavit while preparing our judgment

13 The material averments in the supplementary counter-affidavit are these Sri Agarwal was not aware as to when and what order would be passed by this Court in Writ Petition No 15963 of 1990 At the time when no-confidence motion was put to vote there was no order of this Court staying the meeting of the Board Since the view taken by the Presiding Officer that the motion of no-confidence would be deemed to have been carried was patently erroneous, Sri Agarwal had to file a writ petition in this Court The proceedings of 4th June, 1990, gave an absolutely independent and separate cause of action to him to file a fresh writ petition This subsequent fact was an absolutely independent fact which had nothing to do with the facts and circumstances of the Writ Petition No 15963 of 1990 He did not think it necessary to mention that this Court had reserved its orders in Writ Petition No 15963 of 1990 He was not only advised but it also appeared to him that the effect of the order passed by this Court on 6th june, 1990 was that no motion of no-confidence had been passed against him In spite of the dismissal of the Writ Petition No 15963 of 1990 he would have continued to be the President of the Board on the basis of the blanket stay order passed by this Court on 6th June 1990 In the facts and circumstances and the legal advice taken on these facts and circumstances he was of the definite view that Writ Petition

No 15963 of 1990 having been rendered infructuous, the order passed by this Court on 8th June 1990 after the order of this Court dated 6th June 1990, was of no effect The provisions of the Act do not provide for the sanction or the passing of an order of the President in financial matters exceeding a sum of Rs 1 000/- Such a power belongs to the Board He did not sanction or pass any order relating to matters of finance after the order of this Court dated 8th June 1990 He only counter signed the cheques which were sent by the Executive Officer in accordance with Rule 99 of the Municipal Account Code

14 The burden of the song of Sri Agarwal in the two affidavits, according to our understanding, is that upon the passing of the motion of non-confidence on 4th June 1990, the Writ Petition No 15963 of 1990, which was pending in this Court, had become infructuous and the order dated 8th June 1990 having been passed in an infructuous writ petition was inoperative We may assume that, by necessary implication, Sri Agarwal has taken the plea that on 8th June, 1990, this Court had no jurisdiction to pass the interim order, which it did in Writ Petition No 15963 of 1990

15 In Writ petition No 15963 of 1990 a number of prayers had been made One was to quash the notice issued by the District Magistrate convening the meeting of the Board to consider the motion of non-confidence as against Sri Agarwal The other was to direct the District Magistrate to produce the alleged notice of intention to move a motion of no-confidence and the same may be quashed and the last was that this Court may issue any other suitable direction or writ as deemed fit and proper We have already referred to the prayer made in the application for the interim relief We may emphasise that, according to the case set up by Sri Agarwal himself, for one reason or the other the order passed by this Court in Writ Petition No 15962 of 1990 on 6th June, 1990 was not brought to the notice of the learned Judge who was in seizin of Writ Petition No 15963 of 1990 We may also take note of the fact that in Writ Petition No 15963 of 1990 in paragraph 71 no less than two interim orders passed in two different Writ Petitions by a Division Bench of this Court were quoted One of the orders was passed in Writ Petition No 5778 of 1990 to the following effect

Having heard the learned counsel for the petitioner and the learned Advocate General, we direct that the meeting which is scheduled to be held on 24-3-90 may be held and the motion of no-confidence against the petitioner may also be considered The result of no-confidence motion shall be recorded, but the same shall not be given effect to till further orders of this Court We further make it clear that during this period the petitioner may continue to function as the Chairman

The petitioner No 2 who is a nominated member may also participate in the meeting of no confidence motion has not been given effect to, the effect of this participation in the said meeting and subsequent declaration of the result of no-confidence motion shall be considered when the case is next taken up

It is further ordered that the petitioner may continue to function as already ordered as Chairman However, he shall not sanction or pass orders, regarding financial matters exceeding Rs 1000/-

The other order passed in Writ Petition No 6781 of 1990 was to the following effect

"Meanwhile meeting for considering the motion of no-confidence fixed for 31-3-1990 shall be held and "No-confidence motion" shall be considered and resolution shall be passed but its result shall not be given effect to till further orders of this Court

However any financial transaction of more than 1000/- shall not be made by the petitioner till further orders "

It is to be noted that in both the aforesaid petitions the President of the Board concerned had approached this Court on a date prior to the date of the meeting of the Board concerned to consider the motion of no-confidence This Court, therefore, consciously passed interim orders in the aforesaid two cases to keep alive the writ petitions This Court, on 8th June, 1990 while passing the interim order in Writ Petition No 15963 of 1990 was aware that the meeting of the Board must have taken place on 4th June 1990 and, therefore, in order to safeguard the interest of Sri Agarwal and to keep alive the said writ petition passed the order on 8th June, 1990 By quoting the earlier orders of this Court in paragraph 71 of the writ petition and Agarwal clearly gave an indication that he would be satisfied if a similar order was passed in his case Keeping in view the interest of justice and also observing the principle of comity of orders, this Court on 8th June, 1990, passed the order consciously Sri Agarwal too did not consider the interim order passed on 8th June, 1990 in Writ Petition No 15963 of 1990 either as infructuous or ineffective or having been passed without jurisdiction otherwise there was no necessity to file an application on 11th July, 1990 with the averment in paragraph 2 thereof " in view of the facts that stay application has become infructuous, the petitioner does not want to press his application" and with the prayer "it is, therefore, respectfully prayed that the application be dismissed as having become infructuous and the stay order dated 8th June, vacated " Furthermore, in paragraph 13 of the supplementary counter-affidavit Shri Agarwal has averred that had he been present at Allahabad on 8th June, 1990 "it was quite possible that he would have got his writ petition No 15963 of 1990 dismissed as not pressed on 7-5-1990" This assertion belies the case of Sri Agarwal that, according to his understanding the Writ Petition No 15963 of 1990 had become infructuous on 4th June, 1990 when the motion of no-confidence had been passed and, therefore, any order passed in that petition subsequent to 4th June, 1990 was of no consequence

16 This Court could dismiss the writ petition No 15963 of 1990 after 4th June, 1990 with the liberty to Shri Agarwal to file a fresh petition It could also keep it alive by passing an appropriate interim order therein. Shri Agarwal could have challenged the legality of the decision of the presiding officer given on 4th June, 1990, that the motion of no-confidence had been passed in the Writ Petition No 15963 of 1990 by seeking an amendment of the writ petition Indisputably the interim order passed on 8th June, 1990, could be passed prior to 4th June 1990 Therefore the meeting of the Board could take place on 4th June, 1990 and the motion of no-confidence could be passed on that day Yet it could not be possibly urged that the writ petition became infructuous We have no hesitation in taking the view that the plea taken by Shri Agarwal that the writ petition No 15953 of 1990 had become infructuous on or after 4th June, 1990 and the interim order passed in that petition after that date was an ineffective one, is neither genuine nor bona fide It is a clear afterthought

17 The plea of Shri Agarwal that he acted on legal advice has no legs to stand upon Normally, in such crucial matters, one would expect a contemner to file the affidavit of his legal adviser in support of his plea That has not been done in the present case Curiously enough, even the name of the counsel who gave the advice to Shri Agarwal has been withheld from us We are not inclined to accept the averment of Shri Agarwal that he acted upon such a legal advice Even it be accepted that such an advice was given, in our opinion, the counsel who gave such an advice did not act diligently On the contrary, he acted recklessly The contemner, therefore, cannot derive any advantage from any such advice

18 We may now deal with the plea of the contemner that while countersigning the cheques of an amount exceeding Rs 1000/-he did not "sanction or pass orders regarding financial matters exceeding Rs 1000/-" Section 50 of the Act provides that certain powers, duties and functions of a Board may be exercised by the President Clause (d) of that provision is relevant A reading of S 50 and S 112 of the Act coupled with Schedule I shows that certain powers of the Board are exercisable by the President Some of them,

which may have relevance to the present controversy are (a) to empower the engineer to execute a contract and (c) to transfer movable property of the Board Section 51 empowers the President to watch over the financial administration of the Board Section 127 provides that the matters referred to therein shall be regulated and governed by the rules made by the State Government under S 296 They are (a) the authority on which money may be paid from the municipal fund (b) the conditions on which property may be acquired by the board or on which property vested in the board may be transferred by sale, mortgage lease exchange, or otherwise and (c) any other matter relating to the municipal fund or municipal property in respect of which the Act makes no provision or insufficient provision and provision is necessary Under the said provision it appears the Municipal Account Code has been brought into force In it Rule 5 reads "subject to the provisions of the following rule money shall not be paid from the Municipal Fund except on a cheque signed by the President, or by the Vice-President or an ordinary member of the board duly authorised by the President, and by the Executive Officer or the Secretary" Rule 99 reads "the bill or other voucher presented as a claim for money shall be received and examined by the Secretary and, if the claim be admissible the authority good, and the signature true and in order he shall make an order for payment at the foot of the voucher, and sign it The officer making a payment order is personally responsible that the voucher is complete and affords sufficient information as to the nature of the payment being made" The note appended to Rule 99 reads "the officer should also be required to satisfy himself that the payee actually received the sum passed" The expression ' Secretary ' has been defined in the rules to mean ' the Executive Officer" Apart from the aforementioned provisions of the Act and the Rules our attention has not been drawn to any other material which may have bearing on the exercise of financial power by the President of a Board A combined reading of Rules 5 and 99, as contained in the Municipal Account Code, makes it clear that the duty of the Secretary or the Executive Officer is only to prepare a bill or voucher presented as a claim for money after satisfying himself of the genuineness of the document presented and also of the correctness of the claim for money In Rule 5 it is made clear that no payment shall be made from the municipal fund except on a cheque and that cheque has to be countersigned primarily by the President It is apparent that the Vice-President will be required to sign the cheque only in the absence of the President The President, however has been empowered to authorise an ordinary member of the Board to sign a cheque It is true that the Executive Officer or the Secretary of the board is also required to sign the cheque but such a cheque will not be valid and no money will be paid on its basis unless and until it has been signed by the President The signature of the President on the cheque is a sine qua non for its being encashed and the amount debited from the municipal fund While acting under Rule 5 aforequoted, the President is not expected to act as a mere rubber stamping authority He is also not expected to act mechanically and without any application of mind It is his duty to examine a particular cheque presented to him for being signed along with the voucher etc objectively and also to satisfy himself that a cheque is being issued for a genuine purpose Factually and legally the President sanctions the payment of the amount mentioned in the cheque when he countersigns the same The plea of the contemner, therefore, that while countersigning the cheques he did not sanction any financial matter is untenable We are, therefore convinced that the contemner did sanction payments exceeding Rs 1000/- and such sanctions related to financial matters of the Board

19 The contemner has neither averred nor proved that he was, in fact, under a misapprehension as to the scope of the order of this Court The material before us does not show that the contemner understood the order dated 8th June, 1990 in a particular manner and he conducted himself in accord-

ance with such a construction We cannot therefore attribute an innocent intention or presumption

20 The crucial words in the order dated 6th June, 1990 passed in Writ Petition No 15962 of 1990 as quoted by us above were Until ordered otherwise (Underlining by us) These words could and did not mean that the order of 6th June, 1990 was sacrosanct in so far as it could not be modified or varied by any other order except the one passed in that petition alone The words clearly meant that either in proceedings in the same writ petition or in any other appropriate proceedings this Court could either rescind or vary or modify the order of 6th June, 1990 If the orders dated 6th June 1990 and 8th June, 1990, are placed together and are read together, it will be apparent that both the orders kept intact the right of Shri Agarwal to function as President of the Board in spite of the passing of the motion of no-confidence The effect of the order dated 8th June, 1990 however, was that Sri Agarwal had to work as President under some constraints in relation to the exercise of financial powers No attempt has been made in the counter-affidavits filed by Shri Agarwal to explain as to what did he understand by the words underlined by us or as to what was the alleged legal advice given to him with regard to those words On the contrary, the stand taken is that irrespective of the order of 8th June, 1990 he (Sri Agarwal) was entitled to function as the President of the Board without any restriction whatsoever on the basis of the order dated 6th June, 1990

21 Section 2(b) of the Contempt of Courts Act 1971 defines "civil contempt" to, inter alia mean wilful disobedience to any judgment decree, direction order, writ or other process of a court An act of disobedience in doing what has been prohibited will be civil contempt Whatever is intentional is wilful Therefore deliberate disobedience is culpable For discerning deliberate disobedience, the matter should be examined objectively The inquiry therefore, is "did the contemner have a clear intention to flout? Was his act intentional and deliberate? The order passed by this Court on 8th June 1990 is to be read not only in context with the relevant statutory provision but also in conjunction with the memorandum of the Writ Petition No 15963 of 1990 and the application for interim relief made therein We may indicate that it is not the defence of the contemner that the order of this Court was ambiguous and was reasonably capable of more than one interpretation and that he did not intend to disobey the order but conducted himself in accordance with his interpretation of the same He has contented himself merely by the plea taken in the supplementary counter-affidavit that while countersigning the cheques he did not sanction or pass orders regarding financial matters exceeding Rupees 1000/- It is implicit in the said plea that the contemner was in no doubt as to what the order really meant He has not taken the plea that he had countersigned the cheques on the understanding and belief that he was neither sanctioning nor ordering payment of a sum exceeding Rs 1000 -

22 We are satisfied that the contemner intentionally gave no respect to the aforequoted underlined words in the order of 6th June 1990 passed by this Court with the avowed object of deliberately disobeying the directions contained in the order dated 8th June, 1990 We have already noted that the certified copy of the order dated 8th June 1990 was obtained by and on behalf of the contemner on that very day We may also take note of the fact that the contemner commenced countersigning cheques exceeding a sum of Rs 1000/- with effect from 9th June 1990 We may emphasise that it is not the case of the petitioner that he had not acquired knowledge of the order passed by this Court on 8th June, 1990 on 9th June 1990 and even thereafter We therefore, have no hesitation in recording a finding that the contemner wilfully disobeyed the order dated 8th June 1990

23 A mistake or omission is made not by design but by mischance A foolish mistake or a careless mistake may be a bona fide mistake

The attribute of a bona fide action is that the same is done in good faith or with sincerity or genuineness. Such an action conveys absence of intent to deceive. What is done dishonestly cannot be said bona fide. If a person knows that it is wrong to do a particular act and yet deliberately does it, he cannot assert that he is acting bona fide. Therefore, the chief element of a bona fide act is honesty. A bona fide mistake must be a genuine mistake and not an erroneous view of the law which has been deliberately adopted. No contemner can be allowed to get away by setting up the camouflage of a bona fide action or understanding. We have given a thoughtful consideration to the defence set up by the contemner in this case in the light of the aforementioned tests. We are satisfied that the pleas of the contemner that the order dated 8th June, 1990 was an ineffective one, as the same had been passed in infructuous proceedings and by countersigning the cheques he did not sanction payment exceeding Rs 1000/- cannot be considered to be bona fide.

24 Section 13 of the Contempt of Courts Act may now be considered. This is not a case of technical contempt. The words "due course of justice" used in the section have wider amplitude than the words "due course of any judicial proceeding" or "administration of justice" used in sub-clause (ii) or (iii) of section 2 (c). The words "due course of justice", therefore, have a wide import. If the act complained of substantially interferes or tends to interfere with the broad stream of administration of justice that will be punishable in spite of Section 13. If an act undermines the prestige of the court, it is certainly substantially interfering with due course of justice. Punishment is awarded in the interest of administration of justice. The impairment of the dignity and the authority of the court is to be eschewed. The purpose of contempt proceedings is to preserve and maintain the flow of the stream of justice in its unsullied form and purity. We feel that by disregarding the order dated 8th June 1990 the contemner undermined the prestige of this Court and his act has substantially interfered with the due course of justice. Section 13, therefore, cannot give any protection to the contemner.

25 The apology tendered by the contemner is "notwithstanding the reply given, he tenders unqualified apology, if ultimately he is found guilty of any inadvertent act or omission constituting violation of any order of this Court. Apparently, the apology tendered is conditional and not an abject surrender. The contemner has not thrown himself at the mercy of the Court without any pre-condition. Even if the contemner has tendered an unqualified apology, this, in our opinion, is not a fit case where the same should be accepted and treated as a conviction. We are also satisfied that the apology tendered is not bona fide.

26 Now we come to the question of sentence. Section 12, and sub-section (3) thereof in particular conveys the idea that the normal rule is that a contemner should be punished by being fined and conviction of sentence should be passed in exceptional cases. It is, therefore, apparent that if a court decides to award a sentence of imprisonment to a contemner it must record its reason for doing so. In our opinion, in spite of the contumacious conduct of the contemner, the normal rule should not be departed from.

27 On 4th April, 1991 we reserved our judgment in these petitions and directed that the same may be listed for delivery of judgment on 11th April, 1991. On 8th April, 1991 Shri Ravi Kiran Jain, learned Senior Advocate, who appeared on behalf of Shri Agarwal, made a statement at the Bar that Writ Petition No 15963 of 1990 may be dismissed as not pressed. We accordingly dismiss the same. Now we come to writ petition No 15962 of 1990. It is to be remembered that on 28th May, 1990 writ petition No 15963 of 1990 was presented in this Court by Shri Agarwal. In that petition one of the grievances was that the three nominated members of the Board, namely, Smt Sushila Chauhan, Smt Mahzabeen and Shri Vikal Balmiki had not been administered oath in accordance with law and, therefore, they were not members of the Board and even then the District Magistrate had sent notices to the said three members to participate in the meeting scheduled to be held on 4th June,

1990 to consider the motion of no-confidence against him (Shri Agarwal) In the said writ petition Smt Mahzabeen Smt Sushila Chauhan and Sri Vikal Balmiki were arrayed respectively as respondents Nos 27 28 and 29 Ground No 1 to the said writ petition was also to the effect that the nomination of Smt Mahzabeen Smt Sushila Chauhan as members of the Board was contrary to law

28 The writ petition No 15962 of 1990 was presented in this Court on 6th June, 1990 The presiding officer, it will be remembered has declared the motion of no-confidence as having been carried in the meeting of the Board held on 4th June, 1990 The presiding officer has recorded a finding that 48 members were present and 24 of them had voted in favour of the motion In the petition Shri Agarwal has made a grievance that the District Magistrate acted illegally in not sending a notice of the meeting to Smt Sushila Chauhan In main, the plea raised is that the presiding officer having recorded a finding that there were 48 members of the Board and only 24 voted in favour of the motion, the same could not be declared to have been carried as the requirement of sub-section (12) of Section 87-A of the Act was that a motion shall be deemed to have been carried only when it has been passed by a majority of one half of the total members of the Board It is thus evident that Shri Agarwal took contradictory stands in writ petitions Nos 15963 of 1990 and 15962 of 1990

29 It is significant to note that in writ petition No 15962 of 1990 there is not even a whisper about the filing of the writ petition No 15963 of 1990 on 28th May 1990 Shri Agarwal, for reasons best known to him completely suppressed the information from this Court in writ petition No 15962 of 1990 that he had already filed a writ petition No 15963 of 1990 and the orders therein had been reserved Had this fact been brought to the notice of the learned Judge who entertained and heard the writ petition No 15962 of 1990, he would have in all probability directed the said writ petition to be placed before the learned Judge who was in seizin of writ petition No 15963 of 1990 Had Shri Agarwal invited the attention of this Court to the fact of the filing of the writ petition No 15963 of 1990 two different orders as passed on 6th June 1990 and 8th June, 1990 would not have been passed We note that in writ petition No 15962 of 1990 there is no reference at all to the two earlier orders passed by this Court in similar matters which have been quoted in the memorandum of writ petition No 15963 of 1990 wherein blanket stay orders were not given to the Presidents of the Board and constraint on the exercise of financial powers by them had been put We are satisfied that Shri Agarwal deliberately suppressed material facts from this Court in writ petition No 15962 of 1990 and he did so with the intention of obtaining a more favourable interim order

30 There is yet another aspect of the matter After obtaining interim order on 6th June 1990 in writ petition No 15962 of 1990 Shri Agarwal could have made an application in writ petition No 15963 of 1990 seeking the withdrawal of the writ petition and praying that the same may be dismissed At any rate, his counsel could have brought the fact of the filing of the writ petition No 15962 of 1990 and the interim order passed therein to the notice of the learned Judge immediately after 6th June 1990

31 As equitable remedies are at the discretion of the Court the Court before granting one will inquire whether the conduct of the party seeking the remedy in the matter before it has been conscientious If the conduct be offensive it would be a sound exercise of discretion to deny the relief Misconduct need not be punishable as a crime Any wilful act in regard to a matter in litigation which would be considered wrongful by honest and fair minded men will be sufficient to make the hands of the applicant unclean so as to deprive him of equitable relief There can be no escape from the conclusion that Shri Agarwal came to this Court in Writ petition No 15962 of 1990 with unclean hands Furthermore the conclusion is inevitable that the conduct of Shri Agarwal both at the time of the filing of the writ petition No 15962 of 1990 and even thereafter far from being conscientious was offen-

sive Therefore, he has disentitled himself to get any relief from us in proceedings under Art 226 of the Constitution

32 The fact that we have found him guilty for having committed the contempt of this Court by disobeying the order dated 8th June, 1990 may be an additional ground to refuse him the relief as claimed in writ petition No 15962 of 1990

33 We have already referred to the relevant facts which necessitated the filing of the writ petition No 5350 of 1991 by Shri Agarwal We have examined the impugned order dated 22nd February, 1991 whereby the State Government on 22nd February, 1991 purported to suspend him as the President of the Board It is to be remembered that on the said date Shri Agarwal was functioning as the President of the Board on the basis of the interim order dated 6th June, 1990 passed by this Court in Writ petition No 15962 of 1990 Since we are dismissing the writ petition No 15962 of 1990, a view can be taken that no useful purpose will be served now in passing any orders in this petition This, however, will not be a correct approach as, on account of the dismissal of the writ petition No 15962 of 1990, Shri Agarwal will not automatically cease to be the President of the Board Under S 47-A of the Act Shri Agarwal is entitled to receive a communication as envisaged in sub-section (11) of Section 87-A and thereafter under S 47-A within three days of the receipt of the communication, it will be open to Shri Agarwal to either resign his office or represent to the State Government to supersede the Board stating his reason therefor We are, therefore, proceeding to consider the petition on merits

34 Sub-section (3) of Section 48 of the Act provides that the State Government may place under suspension a President who is called upon to show cause in respect of any ground mentioned in clause (a) or sub-clauses (VI), (VII) and (VIII) of clause (b) of sub-section (2) It will be remembered that a show cause notice was given to Shri Agarwal as to why he should not be removed from the office of the President and those proceedings were pending when the impugned order was passed In the impugned order it is recited that it is being passed in exercise of powers under sub-section (3) of Section 48 We have examined sub-section (3) of Section 48 and have found that clause (a) of sub-section (2) and various sub-clauses of clause (b) of sub-section (2) deal with different situations The impugned order does not disclose the precise reason for suspending the petitioner It appears that the order was passed mechanically by merely referring to sub-section (3) of S 48 On the face of it, it discloses a non application of mind It is therefore, liable to be set aside on this short ground

35 The Contempt Petition No 636 of 1990 succeeds The contemner (Shri Agarwal) is convicted and sentenced to a fine of Rs 1000/- which he shall deposit in this Court within a period of three weeks from today in default of the payment of the fine, the contemner will be sent to the civil prison for a period of two weeks However, there shall be no order as to costs Writ Petitions Nos 15962 of 1990 and 15963 of 1990 are dismissed but without any order as to costs Writ Petition No 5350 of 1991 succeeds and is allowed The order dated 22nd February, 1991 passed by the State Government suspending Shri Agarwal from the office of the President of the Municipal Board, Moradabad, is quashed The consequential order dated 23rd February, 1991 directing Shri Agarwal to hand over the charge of the office of the President to the Vice-President is also quashed However, there shall be no order as to costs

Order accordingly

1991 ALL L J 946

= 1991 Cri L J 2845

S R BHARGAVA, J

Gopal Prasad, Petitioner v State of U P Respondent

Criminal Revn No 1975 of 1990, D/- 6-5-1991

(A) Essential Commodities Act (10 of

1955), Ss 6E, 3 — Bar as to jurisdiction of court — Seizure of salt — Release of — F I R not disclosing that salt was seized in contravention of order issued under S 3 of Act — Court can release salt

1990 Cri LJ 1756 (SC), Disting
(Paras 6, 8, 9)

(B) Essential Commodities Act (10 of 1955), Ss 3, 6E — Bar as to jurisdiction of Court — Seizure of Boora (Unrefined powdered sugar) — Covered under order issued under S 3 — Release of boora — Jurisdiction of Court — Barred under S 6E

U P Sugar and Gur Licensing Orders (1962), Cl 1 (Para 10)

Cases Referred	Chronological	Paras
1990 Cri LJ 1756 (Disting)	AIR 1990 SC 1849	8
1990 All Cri R 804	1991 All Cri C 49	8

Sri V K Chaturvedi, for Petitioner A G A for Respondent

ORDER — This Criminal revision is directed against order dated 14th November 1990 passed by Special Judge (E C Act) Mathura, refusing release of seized property on ground of bar of jurisdiction contained in S 6-E of the Essential Commodities Act which runs as under —

"6-E Bar of jurisdiction in certain cases — Whenever any essential commodity is seized in pursuance of an order made under S 3 in relation thereto or any package covering or receptacle in which such essential commodity is found or any animal vehicle, vessel or other conveyance used in carrying such essential commodity is seized pending confiscation under S 6A the Collector, or as the case may be, the State Government concerned under S 6-C shall have and notwithstanding anything to the contrary contained in any other law for the time being in force any court tribunal or other authority shall not have jurisdiction to make orders with regard to the possession, delivery disposal release or distribution of such essential commodity, package, covering, receptacle, animal, vehicle vessel or other conveyance "

2 Before proceeding further it would be useful to say that Gur'and sugar are essential commodities U P Sugar and Gur' Dealers Licensing Orders 1962 were passed under S 3 of the Essential Commodities Act In sub-clause (a) Gur has been defined as it means the article commonly known as gur, gul, jaggery, shakkar and rab, and includes raw sugar and uncrystallised sugar in any other form comprising of original and convertible molasses and other impurities inherent or foreign prepared by boiling cane or palmyra juice

3 In sub-clause (f) of clause 2 of the Order sugar has been defined as it means any form of sugar including khandsari sugar containing more than 90% sucrose

4 In sub-clause (3) of clause 2 of the order Dealer' has been stated as it means a person engaged in the business of purchase sale, or storage for sale, of vacuum pan factory sugar or open pan khandsari sugar or gur, in quantities (exceeding 10 quintals) at any one time, and includes every such bulk consumer manufacturing biscuits confectionary or sweetmeats, or engaged in fruit canning, fruit preservation or similar other establishment undertaking utilising sugar in his produce, and storing sugar in any quantity (exceeding 10 quintals) at any one time but does not include an industrial undertaking which is engaged in the manufacture or production of vacuum pan factory sugar or open pan khandsari sugar or gur, and which is registered or licensed under the Industries (Development and Regulation) Act 1951

5 Clause 3(1) of these orders prohibit any person from carrying on business as dealer except under and in accordance with terms and conditions of licence issued in this behalf by the licensing authority Sub-clause (3) of clause 3 gives rebuttable presumption that any person who stores vacuum pan factory sugar or open pan khandsari sugar or gur in any quantity (exceeding 10 quintals) at any one time shall unless the contrary is proved be deemed to store the sugar for the purpose of carrying on the business of purchase or sale, or storage for sale *of sugar*

6 Facts as they emerge in this revision are that revisionist Gopal Prasad has a perchune

shop within the territorial limits of Police station Raya Distt Mathura The First Information Report lodged against him shows that on 5th May 1990 at about 1 30 p m the S D M raided his shop During inspection he found ten quintals Boora 9 quintals Chini and 46 bags of salt stored in the shop They were seized under the Essential Commodities Act It was specifically alleged in the First Information Report that the storage was in contravention of the U P Sugar and Gur Dealers Licensing Orders, 1962

7 Under Section 457 Cr P C revisionist approached the Special Judge (E C Act) for release of the seized commodities The learned Special Judge relied upon S 6-E of the Essential Commodities Act and held that he had no jurisdiction and is not competent to release the essential commodities

8 Before proceeding further it would be significant to say that bar under S 6-E applies only when an essential commodity is seized in pursuance of an order made under S 3 If there is seizure which is not in pursuance of any order under S 3 bar of S 6-E is not attracted Case of Anil Kumar v State of U P, 1990 All Cri R 804 related to non-levy cement regarding which there is now clear law that the U P Control Order cannot apply because the Central Order overrides the same In this context it was held that there could be no contravention of an order under S 3 nor could there be any offence Hence the non-levy cement was released In the case of State of Madhya Pradesh v Rameshwar Rathod 1990 Cri LJ 1756 (AIR 1990 SC 1849) provisions of S 6-E of the Essential Commodities Act were not specifically considered It was a case of fair price shop It was held that it was not obligatory for the owner to obtain a licence under the Marketing Act Then there was a general observation regarding jurisdiction of release I am afraid that this ruling is not helpful in deciding the question of jurisdiction under Section 6-E

9 In the instant case it is evident that for salt there is no order under S 3 of the Essential Commodities Act Even in the First Information Report it was not said that the salt was being seized in contravention of any order issued under S 3 Hence for salt the bar of Section 6-E would not have at all arisen The learned special Judge had jurisdiction to release salt It is evident that no offence is alleged to have made out in respect of salt seized from the perchune shop of the revisionist Hence the learned Special Judge should have released salt in favour of the revisionist on such terms and conditions as it thought fit under S 457 Cr P C

10 Coming to the question of 'Boora and sugar, collectively 19 quintals, it was argued on behalf of the revisionist that Boora' is neither gur nor sugar as defined in the aforementioned orders I am afraid that the definition of 'gur' and 'sugar' in the aforementioned order is very wide At this stage it cannot be said that the boora and 'sugar were not under any order issued under S 3 of the Act hence the bar of S 6-E would apply

11 In result, this revision is partly allowed Special Judge concerned is directed to release salt in favour of the revisionist on such terms and conditions under S 457 Cr P C So far as boora' and sugar are concerned, revisionist may apply for release to the Collector or the Government under Section 6-A or 6-C of the Act

Order accordingly

1991 ALL L J 948

= 1991 Cri L J 2847

S R BHARGAVA, J

Chandrapal, Applicant v Smt Harpyari and another, Opposite Parties

*C R No 1831 of 1990, D/- 8-4-1991

(A) Criminal P C (1974), S 401(1) — Revision — Powers of court — Revisional court can make any amendment or any

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*Against the Judgment & Order passed by Shri Bramh Singh, 2nd Addl S J Rampur D/- 25-8-1990

FL II/A601/91/SNV

consequential or incidental order that is just or proper (Para 15)

(B) Criminal P C (1974), S 125 — Maintenance — Frequent remand of applications for or revisions arising therefrom — Would defeat very purpose of S 125

Provisions of S 125 have been engrafted in Criminal Procedure Code for preventing destitution or vagrancy and providing succour to starving persons Frequent remand of cases under S 125 or revisions arising therefrom defeat the very purpose of this section (Para 7)

(C) Criminal P C (1974), S 125 — Maintenance — Quantum — Husband, Village Pradhan — He marrying another woman and having responsibility to maintain child begotten from her — No denial of allegation of his having trade of grain — Grant of Rs 200/- per month as maintenance — Not liable to be interfered with (Para 17)

Cases Referred Chronological	Paras
1987 All LJ 933 (1987) 24 All Cri C 304	14
1979 All LJ 1285 (1980) 17 All Cri C 251	9
1974 Cri LJ 1237	13
1970 Cri LJ 670 AIR 1970 Delhi 98	12
1954 (55) Cri LJ 19 (All)	11
1952 (53) Cri LJ 868 (MP)	10

Mr V P Srivastava, for Petitioner, A G A for Opposite Parties

ORDER — This revision arising from proceedings u/S 125, Cr P C is being disposed of finally at admission stage after notice to opposite parties

2 Revisionist Chandrapal and opposite party No 1 Smt Harpyari are husband and wife Wife filed application u/S 125, Cr P C against the husband claiming maintenance of Rs 500/- per month with the allegations of second marriage of the husband, of cruelty, and desertion and neglect She asserted that the husband has been pradhan of the village He has cultivable land, and business of grain in all having income of Rs 5000/- per month Husband resisted the application and came out with case of denial He pleaded that the wife went away with her cousin and has been living in adultery He offered to keep the wife

3 Learned Magistrate accepted the grounds alleged by the wife and disbelieved the case of the husband that the wife has been living in adultery He narrated the evidence adduced by the wife He said that wife did not file revenue papers showing the extent of the land of the husband and so it was not possible to accept her case that the husband has income of Rs 5000 - per month He allowed maintenance of Rs 100 - per month to the wife

4 Both the parties filed revisions before the Sessions Judge against the order of the Magistrate Revisionist challenged the findings of the Magistrate on the points of second marriage cruelty, neglect and desertion and alleged living of wife in adultery He assailed the order of maintenance passed by the Magistrate On the other hand wife filed revision for enhancement of her maintenance

5 Learned Additional Sessions Judge seized of the revisions confirmed the findings of the Magistrate On the quantum of maintenance he noted that the husband has been erstwhile pradhan and has agricultural land He pointed out to the evidence of the wife that the husband has been carrying on business of grain and has in all income of Rs 5000 - per month He further noted that in her cross-examination wife stated that the husband has 33 bighas of land Then he noted that the husband adduced evidence that he owned only two acres of land and that his income is meagre He further noted that the husband failed to produce revenue papers Then the Additional Sessions Judge said. These days of inflation no one can make a livelihood in such a paltry amount as Rs 100 - per month In my view awarding of maintenance @ Rs 200/- per month would meet the ends of justice '

6 With these findings and observations the learned Additional Sessions Judge dismissed the revision filed by the husband and partly allowing the revision of the wife raised her maintenance to Rs 200 - per month

7 In face of provisions of S 397(3) Cr P C husband could not challenge the findings of the Magistrate on the points of second marriage, cruelty, neglect and desertion wife

not living in adultery and allowing of maintenance of Rs 100/- per month to the wife In the present revision he only challenged the enhancement of maintenance from Rs 100/- to Rs 200/- per month by the Additional Sessions Judge

8 Criticism revealed on behalf of the husband against judgment of the two lower courts is that both of them did not appreciate the evidence about his means The learned Additional Sessions Judge enhanced the maintenance to Rs 200/- only on the ground that the wife cannot sustain herself on Rs 100/- per month The learned counsel for the revisionist referred to the words of S 125(1), Cr P C running as under —

If any person having sufficient means neglects or refuses to maintain —

(a) his wife, unable to maintain herself or

(b) to (d)

a Magistrate of the Ist Class may, upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife , at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time direct "

9 The learned counsel demonstrated before this Court that in S 488 of Criminal Procedure Code of 1898 these words occurred The learned counsel then emphasised that in fixing the quantum of maintenance the Magistrate must be guided by the means of the husband He argued that if the means of the husband are meagre he cannot be directed to pay maintenance to the wife so that she may live comfortably and the husband may starve The learned counsel referred to the observation in the case of Mohd Shamim v Smt Naseem Jahan Begum (1980) 17 All Cri C 251 (1979 All LJ 1285) I do not think that a husband must starve himself in order to maintain his wife

10 In the case of Prabhulal v Parwatibai 1952 (53) Cri LJ 868 It was observed (at page 869)

"It was necessary for the learned Magistrate before determining what maintenance should be allowed to have determined the actual means of the husband of Parwatibai and allocate proper part of it for maintenance It is true that a person taking on the responsibility of marriage has to maintain his wife and mere minority or the fact that the husband does not work cannot come in the way of the maintenance of the wife but it is in all cases necessary to ascertain the feasible means and the earning capacity of the husband if he is compelled to work "

11 In the case of Chameli v Gajraj Bahadur 1954 (55) Cr LJ 19 this Court held that in fixing the maintenance u/S 488 the Court has to take into consideration not only the needs of the applicant but also the paying capacity and the circumstances of the person liable to pay maintenance

12 In the case of Ashish v D C Tewari 1970 (Vol 1) Cr LJ 670 (AIR 1970 Delhi 98) it was held by Delhi High Court that in awarding maintenance u/S 488 Cr P C all the circumstances of the case including the standard of the person liable to maintain should be taken into consideration It is wrong to presume that unless the father can spare some money after maintaining himself, his old mother and the brother, he has no legal obligation to maintain his own minor son, of course in accordance with status and standard

13 In the case of Mohammad Ayyub v Zaibul Nissa 1974 (Vol 2) Cri LJ 1237 this Court held that the quantum of allowance directed to be paid by the husband to the wife has relevance to his means Where the Magistrate does not give any thought to the question as to what are the means existing or potential of the husband justifying an order for payment of allowance to his wife, the order is liable to be set aside

14 In the case of Smt Alimunissa v State of U P and another (1987) 24 All Cri C 304 (1987 All LJ 933) this Court emphasised the status and income of the husband as the criteria for allowing maintenance to the wife

15 The foregoing law clearly shows the principles that the maintenance allowable to the wife must have relevance to the means of the husband, that u/S 125, Cr P C the amount of maintenance allowable to the wife should not exceed Rs 500/-, that the Magistrate must discuss the evidence and determine the means of the husband for fixing the amount of maintenance, means not only mean the tangible property or sources of income of the husband but also mean his capacity, potentiality and status

16 It is true that the two lower courts ignored the above principles in awarding maintenance It was vehemently argued on behalf of the revisionist that since the Additional Sessions Judge ignored the principles of law his order of enhancement should be quashed It is true that both the lower courts did not appreciate the evidence relating to means of the husband for determining his means But the evidence in the lower court record about the means of the husband is small and can be perused in this Court It should not be forgotten that u/S 401, Cr P C a revisional court can make any amendment or any consequential or incidental order that may be just or proper In this connection provisions of S 401(1) and 386(e) can be referred to Provisions of S 125, Cr P C have been engrafted in Criminal procedure Code for preventing destitution or vagrancy and providing succour to starving persons Frequent remand of cases u/S 125, Cr P C or revisions arising there from defeat the very purpose of this section Since the evidence in the case relating to the means of the husband is not voluminous this Court thinks proper to go through the evidence and point out the means of the husband

17 Testimony of the wife is that when she filed the application for maintenance husband was village pradhan He carries on trade of gram and has monthly income of Rs 5000/- In her cross-examination it was elicited that the husband has 33 bighas of land the three brothers have 100 bighas of land There was no cross-examination on the point of trade carried on by the husband Testimony of the husband was that he has only two acres of land yielding meagre income He has no other source of income Suggestion put in his cross-examination that he can pay maintenance of Rs 500/- per month to his wife was denied by the husband This is all the evidence about the sources of income of the husband Then there is one very important circumstance related to the means of the husband It is consistent finding of the two lower courts that he married with another woman from whom he has a child In face of this circumstance testimony of the husband that he has only two acres of land and has meagre income is suppression of his tangible means of income His status has been that of village pradhan He has capacity to keep another woman and beget a child from her whom he is liable to maintain He did not specifically denied his trade of gram Considering all these circumstances, testimony of the wife that the husband has income of Rs 5000/- per month may be exaggeration Excluding the exaggeration the husband cannot be expected to have income of less than Rs 500/- per month

18 Hence, in result, I do not consider it proper to interfere in the enhancement of the maintenance allowance of the wife to Rs 200/- per month Revision is dismissed at admission stage

Revision dismissed

1991 ALL L J 951

= 1991 Cri L J 2857

N L GANGULY, J

Leela Dhar and others, Applicants v State of U P and another, Opposite Parties

C M A No 4309 of 1981, D/-2-4-1991

Criminal P C (2 of 1974), S 202 — Issue of process against accused — List of witnesses mentioned with complaint — Examination of some of witnesses — Omission to make statement or give in writing that complainant does not propose to examine remaining witnesses — Would not vitiate order of summoning of accused

Where in a murder case along with the complaint a list of witnesses of nine persons had been mentioned and only six witnesses were examined out of those nine witnesses, the omission to make a statement or give in writing that the complainant does not propose to examine remaining three witnesses would not vitiate the order of summoning of the accused persons It would be presumed that the complainant examined only six witnesses whom the complainant would be entitled to examine in the Sessions Court The complainant would not be permitted to examine the remaining three witnesses in the Sessions Court when the case is committed to the Court of Session (Para 1)

P M N Singh for Applicants, A G A, for Opposite Parties

ORDER — This application u/S 482, Cr P C for quashing the proceedings in a Criminal Case No 1190 of 1990 pending in the Court of Chief Judicial Magistrate, Hamirpur which was initiated on the complaint filed by the complainant/opposite party The first submission in the case is that all the witnesses named in the complaint were not examined by the learned Magistrate before issuing summons to the accused persons as required under the provisions of S 202, Cr P C which is exclusively triable by the Court of Session The case admittedly is u/Ss 302/147/148/149, IPC Along with the complaint, a list of witnesses of nine persons have been mentioned Out of those, nine witnesses, six witnesses have been examined by the court below Three witnesses namely Lallu s/o Tahlu Mumhar Mishria s/o Dharam Das Chamar and Moniya s/o Tahlu Chamar were not examined The argument of the learned counsel is that the complainant has not submitted any written application nor made any oral statement before the Magistrate concerned that he does not propose to examine these three witnesses The argument is that the orders summoning the accused person is wholly illegal and liable to be quashed I do not consider that this omission to make a statement or give in writing that the complainant do not propose to examine three witnesses would vitiate the order of summoning of the accused persons it shall be presumed that the complainant examined only six witnesses whom the complainant will be entitled to examine in the Sessions Court It is clear that the complainant will not be permitted to examine Lallu Mishria and Moniya as witnesses in the Sessions Court when the case is committed to the Court of Session The first submission of the applicant has no force and thus repelled

2 The next submission of the learned counsel for the accused is that the applicant Nos 1 to 3 namely, Leela Dhar Raj Pal Singh and Hira were aged about 10 and 11 years at the time of incident and on the date of summoning of the accused person they were aged about 12 and 13 years The submission of the learned counsel for the applicant is that the court below has no jurisdiction to summon the aforesaid accused persons for facing trial u/Ss 301/147/148/149 IPC The learned counsel pointed out the provision of S 24 of the Juvenile Justice Act, 1986 and submitted that the applicants Nos 1 to 3, who were admitted Juvenile were not liable to be prosecuted along with the other accused persons in some case by the said Court The provision of S 24 of the said Act is quoted as under

"24 No joint trial of Juvenile and person not a Juvenile — (1) Notwithstanding anything contained in S 223 of the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, no juvenile shall be charged with or tried for any offence together with a person who is not a juvenile

(2) If a juvenile is accused of an offence for which u/S 223 of the Code of Criminal Procedure 1973 (2 of 1974) or any other law for the time being in force, such juvenile and any person who is not a juvenile would, but for the prohibition, contained in sub-sec (1) have been charged and tried together the court taking cognizance of that offence shall direct separate trials of the juvenile and the other person "

3 Since the question whether the applicants Nos 1 to 3 were juvenile on the date of incident is to be enquired into by the courts below, it appears that this question was never canvassed before the courts below As such, it would be necessary that the applicant shall move an application before the Sessions

Judge and it shall be his duty to adjudicate after obtaining report of the Civil Surgeon or Medico Legal Expert to ascertain the present age to bring at the correct age at the time of the incident If anything is found that on the date of incident all these applicants No 1 to 3 were of juvenile age their trial shall be proceeded according to the provisions of the Act

4 After considering the submissions of the learned counsel for the applicant I do not consider the case to be a fit case for interference u S 482 Cr P C except the observations made above

5 With these observations the application is disposed of

6 Let a copy of this order be given to the learned counsel within a week on payment of usual charges

Order accordingly

1991 ALL L J 953

= 1991 Cri L J 2859

P P GUPTA, J

Ashok Kumar alias Bhura Appellant v State of U P Respondent

Criminal Appeal No 545 of 1989, D - 7-2-1991

Penal Code (45 of 1860), S 376 — Rape — Variance on material points between FIR and statements made during trial — Testimony of prosecutrix not corroborated — Eye-witnesses denying occurrence of sexual assault — Conviction on sole testimony of prosecutrix — Not proper

Evidence Act (1 of 1872), Ss 3, 11

Criminal P C (2 of 1974), S 161

Where the statements made by the victim-prosecutrix during trial, contained a lot of improvement over the FIR and was also at variance with the FIR on material points, and the eye-witnesses who were very close relatives of the victim had filed affidavits denying occurrence of such incident and no opinion about rape was expressed by the doctor after pathological examination and there was no other witness to corroborate the victim and the circumstances were also against her it would not be proper to convict the accused on the sole testimony of victim-prosecutrix more so when the relations between the father of the accused and victim s husband were strained (Paras 28 29)

Corroboration is not the sinequanon for a conviction in a rape case and on principle the evidence of a victim of sexual assault stands at par with evidence of an injured witness The evidence of a victim of a sex offence is entitled to great weight absence of corroboration notwithstanding and while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases such evidence cannot be expected in sex offences having regard to the very nature of the offence But corroboration may be insisted upon when there is likelihood of the prosecutrix having levelled such an accusation on account of the instinct of self preservation or when the probability factor is found to be out of tune Further, in the case of a grown up and married woman having grown up children it is always safe to insist on such corroboration Such corroboration may be sought either from direct or circumstantial evidence or from both (Paras 20 21)

Minor omissions and variations in FIR would not affect the prosecution case if it is substantially the same as was mentioned in the FIR, but designed and deliberate omissions or variations are not inconsequential particularly when the FIR has been lodged by the prosecutrix herself to whom all the important facts were known and if she does not mention them in the FIR such omission goes to the root of the prosecution and affects the probabilities of the case such conduct is relevant u/S 11 of Evidence Act in judging the veracity of the prosecution case (Paras 25 26 27)

N S Kulshrestha for Appellant A G A, for Respondent

EI/GI/A550/91/HK/VNP

JUDGMENT — This is an appeal preferred by the accused appellant, Ashok Kumar alias Bhura, against the judgment and order dated 22-2-1989, convicting the appellant u/S 376 I P C and sentencing him to undergo R I for three years by Sri P C Mathur, III Addl Sessions Judge, Aligarh in S T No 223/88

2 The appellant was charged u/S 376, I P C for having committed rape on Smt Bhagwati, wife of Mahabir Singh, resident of Jagdeo Nagaria, P S Gonda, district Aligarh, on 7-7-1986 at about 10-00 p m

3 The facts material for the purpose of this appeal in brief, as disclosed in the FIR, are indicated below

4 Smt Bhagwati was sleeping on a Chabutara in front of her house Her son, Bhupendra Singh, aged about 9 years, and her younger son, Yogendra Singh, aged about one year, were also sleeping there Her Jethani, Smt Banshi, wife of Fateh Singh, and her father-in-law, Dr Man Singh, son of Brindaban, were sleeping in front of their houses close by

5 At about 10 00 p m in the night on 8-7-1986, the appellant, Ashok Kumar, son of Hodal Singh, resident of the same village, arrived there and started having intercourse with Smt Bhagwati She remained silent presuming that he was her husband After a few seconds, she realised that the person, **having intercourse with her**, was not her husband She tried to push him away but, being stronger, he continued to have intercourse with her She then raised an alarm and on hearing her voice her Jethani, Smt Banshi, and father-in-law arrived at the Chabutara where she was sleeping They tried to apprehend the appellant, but he managed to run away

6 A FIR of the incident was lodged the next day on 8-7-1986 at 1 00 a.m , i e about three hours after the alleged occurrence The prosecutrix was medically examined on 8-7-1986 at 1-10 p m No marks of external injury were seen over her private parts Hymen was absent Vaginal smear was taken and sent for Pathological examination for the evidence of spermatozoa No opinion about rape was, however, expressed by the Doctor

7 The Chemical Examiner examined the underwear of the appellant and Petticoat of the prosecutrix, which they were allegedly wearing at the time of occurrence No spermatozoas were found on the under-wear but they were found on the Petticoat

8 Only two witnesses of facts, viz the prosecutrix P W 1 Smt Bhagwati and her husband, P W 2, Mahabir Singh, were examined by the prosecution Rest of the witnesses, viz. Smt Banshi, the Jethani and Man Singh, the father-in-law of the prosecutrix, were not examined as they filed their affidavits in the lower court denying to have seen the occurrence Out of the two witnesses of facts examined, P W 2, Mahabir, the husband of the prosecutrix, is a formal witness, who had not seen the occurrence Thus, the only witness left was the prosecutrix, Smt Bhagwati, herself On the solitary statement of Smt Bhagwati, the prosecutrix, and other attending circumstances of the case, the learned Sessions Judge found the appellant guilty of the offence u/S 376, IPC Accordingly, the appellant was convicted and sentenced as above

9 It was argued on behalf of the appellant that the story, as set up in the FIR itself, is highly unbelievable and unpalatable A bare reading of the FIR makes it clear that it is a false and cooked up case against the appellant It was further alleged that because of strained relations between the parties, a false case had been set up against the appellant

10 According to the FIR, the occurrence is said to have taken place at about 10 00 p m in the night in an open place The prosecutrix Smt Bhagwati, was sleeping on a Chabutara in front of her house along with her two sons, one of whom was 9 years old Nearby, her Jethani, Smt Banshi, and her father-in-law Dr Man Singh, were also sleeping in front of their houses Allegedly, the appellant, Ashok Kumar, arrived there and started having intercourse with Smt Bhagwati She neither protested nor raised any alarm presuming that he was her husband who had returned from village Pancha-

yat After a few seconds she realised that he was not her husband but some one else Then she tried to push the appellant off but being stronger he did not leave her and continued intercourse It was then that she raised alarm, hearing which her Jethani Smt Banshi, and her father-in-law, Dr Man Singh, arrived there who saw the incident with their own eyes They tried to apprehend the appellant but he managed to run away

11 At the very outset it may be said that the story, as set up in the FIR, is highly improbable, unbelievable and unacceptable It is highly unnatural and unbelievable that the appellant would have chosen a place for having intercourse where nearby the close relatives of the prosecutrix were also sleeping It is also highly improbable to believe that even when the appellant commenced intercourse with the prosecutrix she failed to identify as to whether he was her husband or some one else Even from the odour of the perspiration, physique, the size and length of the organ, the manner of intercourse and other factors, a married woman, having two children, would immediately realise as to whether the person having intercourse with her was her own husband or someone else It cannot therefore, be believed that the prosecutrix could not realise so immediately after the commencement of intercourse Thus, this fact that at the time the intercourse was commenced the prosecutrix did neither resist nor raised any alarm makes her own conduct very doubtful

12 In later part of the FIR, it is mentioned that after the prosecutrix realised that the person having intercourse with her was not her husband, but an outsider, she tried to push him away but did not raise any alarm at that very moment This also raises a suspicion Her normal conduct, in the circumstances, would have been to raise alarm immediately thereafter Instead, she gave an opportunity to the appellant to complete the intercourse and it was only thereafter that she raised an alarm

13 It is also important to note that both Smt Banshi, the Jethani, as well as Dr Man Singh, the father-in-law of the prosecutrix, who are said to have seen the occurrence, have not supported the prosecution story They have filed their affidavits denying that such an occurrence took place They are close relatives of the prosecutrix According to the version in the FIR, both of them were sleeping in the open, close to the place where the occurrence took place It is also mentioned in the FIR that on hearing the alarm raised by the prosecutrix, they arrived at the scene of occurrence, saw the occurrence also and tried to apprehend the accused appellant, who managed to run away Had it been a fact they would have certainly supported the prosecution There cannot be any occassion for them to have shielded the appellant instead of saving the honour of their close relative This is a circumstance which goes against the prosecution

14 The statement of the prosecutrix, Smt Bhagwati, during trial contains a lot of improvement over the FIR Firstly, she has stated that her sons, Bhupendra and Yogendra were sleeping on the other cot This improvement has been made realising that the story as set up in the FIR that intercourse was done on the same cot on which her both the sons were sleeping, may not be believed She has further stated that as soon as the appellant arrived there and lifted her Petticoat, she identified him and tried to raise alarm, but she was prevented as her mouth was gagged by the appellant This important fact is missing from the FIR She further stated that after closing her mouth by one hand, the appellant managed to complete the intercourse This is another fact which cannot be believed

15 In this connection it is important to note that neither in the FIR nor in his statement, any source of light is mentioned On the contrary, the prosecutrix, Smt Bhagwati has stated that it was a dark night She has further stated that the appellant was wearing a bush-shirt of green colour and trousers While mentioning the colour of bushshirt as green, she could not give the colour of the Pajama because of dark night This statement is not in consonance with her earlier statement in which she states that she identified the person committing rape as Ashok Kumar, the appellant If the night was

dark and there was no source of light how she could identify the appellant and the colour of the bushshirt that he was wearing

16 Again she has stated that after the occurrence she called her husband from Panchayat who then proceeded to the Police Station for lodging the report along with her In subsequent part of her statement she has stated that her husband arrived on his own on hearing the alarm He was not sent for This is in contradiction of her earlier statement that she called her husband after the occurrence

17 Another material contradiction in her statement under S 161 Cr P C and the statement made during trial is to the effect that her son was there on the same cot on which the rape was committed and when he got compressed and screamed during intercourse the appellant brought her down from the cot She subsequently retracted from this part of her statement P W 4 K D Pathak the Investigating Officer has stated on oath that the prosecutrix Smt Bhagwati, stated before him that her sons, Bhupendra, aged 9 years and Yogendra, aged one year, were sleeping in the same cot on which she was sleeping During the intercourse her son Yogendra got compressed and screamed and it was thereafter that she was brought down from the cot by the appellant By that time the intercourse was not complete It was only then that she realised that the person, who had brought her down was not her husband Immediately thereafter the appellant gagged her mouth thus preventing her from raising alarm She claims to have raised alarm only after the appellant left her after completing the intercourse Thus, the statement given by the prosecutrix, during investigation, is against her statement during trial As stated earlier it was not clearly mentioned in the F I R whether her two sons were sleeping on the same cot or on a separate cot Again, before the Investigating Officer, she has stated that they were sleeping on the same cot and when the appellant came over her, the younger son got compressed and screamed Thereupon she was brought down from the cot by the appellant It was then that she realised and identified that the person was not her husband She was prevented from raising alarm because her mouth was gagged In her statement during trial she has given a different story As has been stated above, she has stated that as soon as the appellant lifted her Petticoat she woke up and identified the appellant She tried to scream but was prevented from doing so as the appellant gagged her mouth Thus it is clear that the statement of the prosecutrix, given during trial is at a variance with her statement given during investigation When her attention was drawn to this material contradiction on vital and important facts, she could not give any satisfactory explanation Her statement, during trial, is also at variance with the F I R on material points

18 It is to be considered whether under these circumstances it would be safe to base the conviction on sole testimony of the prosecutrix

19 It was submitted on behalf of the State that in such cases of rape corroboration may not be insisted as a rule

20 I agree that corroboration is not the sinequanon for a conviction in a rape case On principle the evidence of a victim of sexual assault stands at par with evidence of an injured witness The evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding and while corroboration in the form of eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence But corroboration may be insisted upon when there is likelihood of the prosecutrix having levelled such an accusation on account of the instinct of self preservation or when the probabilities factor is found to be out of tune

21 Moreover, in the case of a grown up and married woman, having grown up children, it is always safe to insist on such corroboration Such corroboration may be sought either from direct or circumstantial evidence or from both

22 In the instant case, however, it is established that the accusation of rape against the accused is either motivated or is on

account of the instinct of her self preservation The probabilities factor in this case is also found to be out of tune

23 As has already been stated above, there is no corroboration of the statement of the prosecutrix either from direct or circumstantial or even from medical evidence Her own Jethani and Sasur who are said to be eye witnesses, have filed affidavits denying that any such occurrence took place There is no other witness to corroborate her The circumstances also go against the prosecutrix instead of supporting her Hence it would not be safe to base conviction of the appellant on the sole testimony of the prosecutrix, Smt Bhagwati

24 It was next submitted on behalf of the State that minor omissions in F I R may not be material to disbelieve the prosecution story

25 No doubt, a F I R is a previous statement which can, strictly speaking, be only used as to corroborate or contradict the maker of it It is not necessary that all the details given in his statement in Court by complainant be given in the F I R Matters of detail need not be mentioned in it Minor omissions and variations in F I R would not affect the prosecution case, if it is substantially the same as was mentioned in the F I R

26 Though F I R is not an encyclopaedia, but designed, deliberate and belated plea of prosecution in evidence of prosecutrix that she was brought down the cot by the appellant and her mouth was gagged thus silencing her and preventing her from raising alarm by the appellant who had sexual intercourse with her against her will and without her consent, when all these important facts were not mentioned in the F I R , is meant only to demolish the theory of consent Such omission is not inconsequential

27 In the instant case the F I R was lodged by the prosecutrix herself to whom all the above important facts were known, and she did not mention these facts in the F I R , such omission goes to the root of the prosecution and affects the probabilities of the case, such conduct is relevant under S 11 of the Evidence Act in judging the veracity of the prosecution case

28 The F I R is not specific on the point whether the two sons of the prosecutrix were sleeping on the same cot or on a different cot The F I R also does not mention as to where her husband was at the time of occurrence During investigation she has stated that her both sons were sleeping on the same cot During intercourse her younger son got compressed and screamed It was thereafter that she was brought down the cot by the appellant It was then that she realised that the person committing rape was not her husband She tried to raise alarm but she was prevented from doing so by the appellant who gagged her mouth In her statement during trial she claims to have identified the appellant immediately after he came over her and lifted her petticoat She tried to raise alarm but was prevented on account of her gagging her mouth by the appellant There is no averment in the F I R that she was brought down the cot by the appellant where the intercourse was completed According to her statement during trial it was only then that she realised that the person who had brought her down the cot was not her husband but the appellant It was there that her mouth was gagged by the appellant thus preventing her from raising alarm She admits that the night was dark No source of light is mentioned How then she could identify the appellant is also not clear Moreover it also cannot possibly be believed that by closing the mouth with one of his hands, the appellant succeeded in bringing her down the cot and in completing intercourse with her There is also no explanation as to why she did not raise any alarm while she was brought down the cot by the appellant Thus, this part of the story that she identified the appellant cannot also be believed There is variation also in her statement regarding the arrival of her husband In the F I R it is not mentioned that her husband had gone to attend Panchayat meeting In her statement during trial she has stated that her husband was sent for and after his arrival both of them went to the Police Station for lodging the F I R In subsequent breath she has stated that he was not sent for but he came there of his own accord It cannot

be believed that the husband would have gone to attend a Panchayat meeting at 10 00 p m in the night It is also important to note that none of the witnesses, who were there in the Panchayat meeting, have been examined by the prosecution It is, therefore, not established that any Panchayat meeting was held on the date and time when this occurrence allegedly took place and the appellant was also present there In all these circumstances it cannot be believed that her husband was away in the night when this occurrence allegedly took place Thus, looking to the variations in the F I R , the statement of the prosecutrix under S 161, Cr P C and her statement during trial, I am of definite opinion that the prosecutrix, who is solitary witness in the case, is totally unreliable and unbelievable In the circumstances, it will not be safe to base conviction of the appellant on her sole testimony The possibility of false implication of the appellant in the case due to strained relations between the father of the accused and the husband of the prosecutrix cannot be ruled out

29 Looking to the totality of the circumstances and the entire prosecutrix evidence I am of the opinion that the case against the appellant has not been proved by the prosecution The appellant is, therefore entitled to acquittal

30 For the reasons given above the appeal must be allowed

31 The Appeal is allowed and conviction and sentence of the appellant, Ashok Kumar, are set aside He is not on bail He need not surrender His bail bonds are dismissed

Appeal allowed

1991 ALL L J 958

(SUPREME COURT)

(From 1989 (1) All Rent Cas 476)

LALIT MOHAN SHARMA AND
J S VERMA, JJ

Civil Appeal No 3656 of 1991, D/-17-9-1991

Ghan Shyam Das Gupta and another, Appellants v Anant Kumar Sinha and others Respondents

Constitution of India, Art 226 — Alternative remedy — Writ petition questioning executability of decree — Civil P C contains elaborate and exhaustive provision — Writ petition not to be entertained

Civil P C (1908), O 21, Rr 97, 106

(1989) 1 All Rent Cas 476, Reversed

The remedy provided under Art 226 is not intended to supersede the modes of obtaining relief before a Civil Court or to deny defences legitimately open in such actions So far the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all its aspects The numerous rules of O 21 of the Code take care of different situations, providing effective remedies not only to judgment-debtors and decree-holders but also to claimant objectors as the case may be In an exceptional case, where provisions are rendered incapable of giving relief to an aggrieved party in adequate measure and appropriate time, the answer is a regular suit in the Civil Court The remedy under the Civil Procedure Code is of superior judicial quality than what is generally available under other statutes, and the Judge being entrusted exclusively with administration of justice, is expected to do better It is difficult to find a case where interference in writ jurisdiction for granting relief to a judgment-debtor or a claimant objector can be justified The writ petition filed by members of the tenant's family claiming that the eviction decree passed against the tenant alone is not binding upon them as they (petitioners) along with the tenant constitute a joint family and they are as such tenants in their own right, ought to have been rejected on ground of alternative remedy

(1989) 1 All Rent Cas 476 Reversed (Para 8)

Cases Referred Chronological	Paras
AIR 1975 SC 1867 (1976) 1 SCR 102	8
AIR 1975 SC 2151 (1976) 1 SCR 521 1975 Lab IC 1585	8
AIR 1964 SC 1419 (1964) 6 SCR 654	8

H(J)/S770/91/VVG

SHARMA, J — Special leave is granted

2 This appeal is directed against the judgment of Allahabad High Court, allowing the writ petition of the respondents Nos 1 to 5 under Art 226 of the Constitution and directing that they shall not be evicted from the premises in dispute in pursuance of an eviction decree passed by the Small Causes Court Allahabad The main question which arises for decision is whether in the facts and circumstances of the case the High Court was justified in entertaining the writ petition under Art 226 of the Constitution, and proceeding to issue the impugned direction

3 The appellants are the owners of the premises in question which according to their case was in possession of Dr K C Sinha as tenant After his death his son Prabhas Kumar Sinha, respondent No 7, continued in possession The writ petitioners-respondents are the sons of the brothers of Dr K C Sinha, and according to their case they being members of the joint Hindu Family along with Dr K C Sinha are tenants in their own right under the appellants The case of the appellants is that they were subsequently inducted in the premises as sub-tenants by Prabhas Kumar Sinha and did not have any independent right

4 The eviction suit in the Small Causes Court was filed by the appellants against Prabhas Kumar Sinha for his eviction, without impleading the writ petitioners, and the decree passed therein is under challenge by the judgment-debtor Prabhas Kumar Sinha in revision before the High Court In this background the respondents Nos 1 to 5 approached the High Court under Art 226 of the Constitution claiming that they, not being parties in the eviction case, are not bound by the decree

5 The appellants in support of their denial of the claim of independent right as tenants of the writ petitioners, pleaded supporting facts and circumstances in detail inter alia alleging that the writ petitioners have deliberately concealed the fact that they were parties in an immediately preceding case under the provisions of the Rent Act for release of the premises in favour of the landlord-appellants and that the release order was ultimately made by the delegated authority overuling their objection

6 The High Court has held that since the claim of the writ petitioners was not examined and decided in the suit and the decree was passed against Prabhas Kumar Sinha only, they cannot be evicted from the premises unless a decree is expressly passed against them It has been observed that the appellants must proceed to file a suit against the writ petitioners and obtain a decree against them if they intend to eject them

7 It has been contended, and in our view correctly, that if the claim of the writ petitioners of being in possession of the premises as tenants in their own right is rejected and they are held to have been inducted by Prabhas Kumar Sinha or his father Dr K C Sinha, they are liable to be evicted in execution of the present decree It was, therefore, necessary to adjudicate upon the dispute between the parties and record a finding on the character of possession of the writ petitioners before proceeding to consider whether the decree is executable or not against them and having not done so, the High Court has seriously erred in law in allowing the writ petition by the impugned judgment The decision on the disputed issue was dependent on the consideration of the evidence to be led by the parties, and while exercising the writ jurisdiction the High Court was not expected to go into that question In the circumstances the Court ought to have refused to dispose of the writ petition on merits, leaving the writ petitioners to avail of the remedy before the Civil Court The error in the judgment as pointed out earlier was the consequence of the initial mistake in entertaining the petition

8 The principle as to when the High Court should exercise its special jurisdiction under Art 226 and when to refuse to do so on the ground of availability of an alternative remedy has been settled by a long line of cases The remedy provided under Art 226 is not intended to supersede the modes of obtaining

relief before a Civil Court or to deny defences legitimately open in such actions. As was observed in State of Andhara Pradesh v Chitra Ventaka Rao (1976) 1 SCR 521 (AIR 1975 SC 2151) the jurisdiction to issue a writ of certiorari is supervisory in nature and is not meant for correcting errors like an appellate Court. In Thansingh Nathmal v A Mazid, (1964) 6 SCR 654 (AIR 1964 SC 1419) a case dealing with liability to pay sales tax, the appellants without following the statutory remedy under the Sales Tax Act, moved the High Court under Art 226 on the ground that the Act was ultra vires. The challenge was rejected. Another contention namely, that the finding of the Commissioner that the goods were actually within the State at the time of the contract was based on no evidence and was purely speculative, was also raised. This ground also failed before the High Court and the writ petition was dismissed. Approving the decision this Court observed that if the appellants had persued the statutory remedy under the Act and the question had been referred to the High Court, the Court could have appropriately advised the Commissioner but not having done so, the High Court could not be asked to assume the role of an appellate Court over the decision of the Commissioner either on a question of fact or even of law. Again when a learned single Judge of the High Court and on appeal a Division Bench proceeded to examine the correctness of an order in relation to grant of a permit to ply a vehicle under the Motor Vehicles Act it was observed by this Court in M Naina Mohammed v K A Natarajan, (1976) 1 SCR 102 (AIR 1975 SC 1867) that the power under Art 226 is supervisory in nature and the Judges at both the tiers had unwittingly slipped into the subtle but, fatal, error of exercising kind of appellate review. So far the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all its aspects. The numerous rules of O XXI of the Code take care of different situations, providing effective remedies not only to judgment-debtors and decree holders but also to claimant objectors as the case may be. In an exceptional case where provisions are rendered incapable of giving relief to an aggrieved party in adequate measure and appropriate time, the answer is a regular suit in the Civil Court. The remedy under the Civil Procedure Code is of superior judicial quality than what is generally available under other statutes, and the Judge being entrusted exclusively with administration of justice, is expected to do better. It will be, therefore, difficult to find a case where interference in writ jurisdiction for granting (relief) to a judgment-debtor or a claimant objector can be justified. The Rr 97 to 106 of O XXI envisage questions as in the present appeal to be determined on the basis of evidence to be led by the parties and after the 1976 Amendment, the decision has been made appealable like a decree. The High Court in the present case, therefore ought not to have embarked upon a decision of the writ petition on merits and should have refused to exercise its special jurisdiction on the ground of alternative remedy before the Civil Court.

9 We, accordingly set aside the impugned judgment and dismiss the writ petition of the respondents without examination of the merits of the rival cases of the parties. The appeal is allowed with costs, assessed at Rs 2,000/-

Appeal allowed

1991 ALL L J 960

(SUPREME COURT)

(From Allahabad)

KULDIP SINGH AND
MADAN MOHAN PUNCHHI, JJ

Criminal Appeal No 579 of 1976 with 99 of 1987, D/- 21-8-1991

State of U P, Appellant v Kapil Deo and another Respondents

Penal Code (1860), Ss 302, 34, 201 — Murder — Acquittal of accused charged under S 302 — Remaining accused charged under S 302 read with S 34, held entitled to acquittal — Could not also be convicted under S 201

HI/II/S712/91/DVT

Murder — Conviction of one accused under S 302 and other two under S 302 read with S 34 by trial Court — Acquittal of accused convicted under S 302 by Supreme Court on ground that circumstantial evidence did not prove his guilt beyond reasonable doubt — Opportunity to commit murder available equally to all accused — Not enough to hold them guilty of crime — Accused alleged to have taken prominent part in committing crime, acquitted — Rest two accused entitled to acquittal — They could not be held accessories to crime before occurrence took place nor inference that murder was committed in furtherence of common intention of all could be drawn — Dead body put inside a trunk recovered from house of two accused — No proof that they put the body inside the trunk — Could not be convicted under S 201

AIR 1977 SC 1116, Ref to

AIR 1971 SC 1461, Rel on

(Paras 9, 10)

Cases Referred	**Chronological**	**Paras**
AIR 1977 SC 1116	1977 Cri LJ 950 (Ref to)	6
AIR 1971 SC 1461	(1971) 3 SCC 247 1971 Cri LJ 1139 (Rel on)	9, 10

PUNCHHI, J — These two Criminal Appeals have common roots and are being disposed of together They have arisen in the following circumstances

2 Vinod Kumar, aged about 12 years, was a poor boy of Village Lar, District Deoria, in the State of Uttar Pradesh He is the victim in the instant crime On or about July 1, 1968, the said Vinod Kumar was employed by Kapil Deo accused as a domestic help in his house at Village Lar Kapil Deo, his wife Smt Sheo Kumari, his son Vidya Sagar, and his brother Ramapati were living together in that house at village Lar All the four are the accused involved herein At about 4 00 p m on July 16, 1968, Vinod Kumar deceased and Vidya Sagar accused were playing with some other boys near the house of Kapil Deo Kapil Deo and Ramapati on arrival there scolded the boys for playing there and took Vinod Kumar servant and Vidya Sagar, accused in the house asking the other boys to scatter away Those boys included Mohan Singh, P W 1, Hridyanand, P W 2 and Akhilanand P W 3 Despite there being asked to go away, still the boys resumed their play after a while They then heard the cry of Vinod Kumar and by clambing a grilled window (jangla) of the house of the accused, they could see the crime being committed in another room of the house which had a door ajar making vision possible Their version was that they had seen Kapil Deo and Ramapati holding Vinod Kumar against the wall of the room and Vidya Sagar cutting the throat of Vinod Kumar with a big knife The eye witnesses raised an alarm Vidya Sagar, accused thereafter came out from the house while wearing an underwear with a blood-stained knife in his hand and thereafter took to his heals Smt Sheo Kumari accused closed the doors of the room and the window In the meantime some people already assembled outside the house tried to apprehend Vidya Sagar accused but having failed to do so, one of them Mohan Singh, P W 1 went to Police Station, Lar and lodged the First Information Report After the necessary investigation and collection of material, the four accused were committed for trial to the Court of Session at Deoria, Uttar Pradesh

3 At the trial, all the four accused were charged under S 302, S 302 read with S 34, I P C and S 201 read with S 34, I P C The cause for charge under S 201 read with S 34, I P C was that on interrogation made from Kapil Deo and Ramapati accused they pointed out a trunk, in which the dead body of Vinod Kumar was found contained in a gunny bag, in a room of their house The trunk contained as well a blood-stained Pyjama of Vidya Sagar

4 The trial Judge vide his judgment dated October 27, 1970 convicted Vidya Sagar, accused for an offence under S 302 I P C and the remaining three accused under S 302 read with S 34, I P C , sentencing all of them

to death He, however, acquitted all the four accused of the offence under S 201 read with S 34, I P C

5 On reference to the High Court for confirmation of the death sentence as well as on appeal by all the accused, the High Court of Allahabad on April 6, 1971 upheld the conviction of Vidya Sagar, accused for offence under S 302, I P C reducing his sentence to imprisonment for life The remaining three accused were acquitted of the charge under S 302 read with S 34, I P C

6 The matter was brought to this Court by Vidya Sagar, accused in Criminal Appeal No 236 of 1971 against the aforesaid judgment of the High Court The State of Uttar Pradesh as well filed Criminal Appeal No 579 of 1976 against Kapil Deo and Ramapati, accused leaving aside Smt Sheo Kumari, accused That appeal on admission was ordered to be heard with Criminal Appeal No 236 of 1971 preferred by Vidya Sagar Since respondents in Criminal Appeal No 579 of 1976 being Kapil Deo and Ramapati, could not be served by the time when both the matters came up for disposal on 22-2-1977 before a bench of this Court, the appeal of Vidya Sagar alone was heard and was allowed The evidence which had bearing in the appeal of Vidya Sagar, accused alone was scrutinised and opined upon The High Court on its part placing no reliance on the eye-witnesses had upheld the conviction of Vidya Sagar, accused because of four circumstances enumerated in judgment reported as Vidya Sagar v State of U P , AIR 1977 SC 1116 at pages 1118-1119, and this Court, one by one, demolished all the circumstances concluding as follows (Para 11)

> "It would thus appear that the four pieces of circumstantial evidence on which reliance has been placed by the High Court for upholding the conviction of appellant Vidya Sagar, could not be said to prove beyond reasonable doubt that he committed the murder of Vinod Kumar These circumstances do not answer the well-established test that where evidence is circumstantial, it must be consistent with the sole hypothesis that the accused is guilty of the crime charged Moreover, as has been pointed out, the High Court did not examine the other evidence and circumstances referred to above which had a bearing on the guilt of the appellant

7 We would not like to burden this judgment with the details of those four circumstances since resort can be had to the reported judgments The end result was the acquittal of Vidya Sagar accused While disposing of the case, the Bench took care to observe that nothing in the said judgment be taken to have any bearing on the appeal of the State against the acquittal of accused Kapil Deo and Ramapati The Bench also observed that it may, perhaps, require in that appeal, examination of the question whether by reason of the concealment of the dead body in the trunk those two persons could or could not be convicted under Section 201, I P C even if they were not held guilty of the offence under Section 302, I P C

8 Kapil Deo and Ramapati, accused-respondents in Criminal Appeal No 579 of 1976 were served after a long lapse of time On January 29, 1986, a bench of this Court became seizer of the matter It perhaps was made aware that the acquittal of the accused-respondents by the trial Judge, under S 201 read with Section 34, I P C had not been challenged by the State of U P by filing an appeal against the acquittal before the High Court, which fact had specifically been taken note of by the High Court in its judgment dated April 6, 1971 For that reason, the Bench granted time to the State of U P for filing special leave petition against the judgment of the learned Sessions Judge acquitting all the four accused-respondents of the charge under S 201 read with Section 34, I P C ordering at the same time that the said special leave petition when filed should be heard along with Criminal Appeal No 579 of 1976 On the filing of such application leave was granted and Criminal Appeal No 99 of 1977 as its product has been placed before us for disposal along with Criminal Appeal No 579 of 1976

9 We have heard learned counsel for the parties and have perused the evidence and material on the record The fact staring at us is that the prosecution case collapsed so far as Vidya Sagar, accused is concerned and he stands acquitted of the charge of murder It is to be borne in mind that he prominently was assigned the offensive part of the crime of murder It is he who was seen cutting the throat of the deceased with a big knife It is he who was seen escaping from the scene of the occurrence carrying a blood-stained knife in his hand It is he who was sought to be apprehended by the eye-witnesses and others collected there When the evidence against him, ocular as well as circumstantial, has cautiously been weighed by this Court resulting in his acquittal, we find it difficult to convict the said accused for offence under Section 201 read with Sec 34, I P C This Court though slightly in different circumstances in Duvvur Dasrathatammareddy v State of Andhra Pradesh, (1971) 3 SCC 247 (AIR 1971 SC 1461) observed as follows

"If the evidence relating to the offence of murder and disappearance of evidence is the same and the case of the prosecution regarding the offence of murder is not accepted, it follows that the accused cannot be convicted for the offence under Section 201, I P C "

One of the circumstances which weighed in favour of Vidya Sagar, accused was that he alone was not in the house to be solely responsible for the murder when committed and at that time besides him therein were said to be Kapil Deo and Ramapati, accused What has been spelled out in favour of Vidya Sagar can with equal force apply to the case of Kapil Deo and Ramapati, accused If the so-called opportunity to like-wise commit the crime was available to Kapil Deo and Ramapati and not a circumstance to hold Vidya Sagar as one of the inmates of the house guilty, it can conversely be said in the same manner about the guilt of Kapil Deo and Ramapati. Their being available in the house per se was not enough to hold them guilty for the offence of murder Thus there is no occasion to convict Kapil Deo and Ramapati, accused-respondents in Criminal Appeal No 579 of 1976 for the offence of murder in view of the verdict of acquittal in favour of Vidya Sagar The High Court itself had observed that there was hardly any evidence to connect Kapil Deo Ramapati and Smt Sheo Kumari, accused with the murder of Vinod Kumar especially when the eye-witnesses account given by P Ws 1 to 3 was not very reliable And further that from the circumstance that the aforesaid three accused were inside the house at the time of the murder it could not be inferred that they were accessories to the crime before the occurrence took place nor could it be inferred that the murder was committed in furtherance of the common intention of all On this basis, these three accused were given the benefit of doubt and acquitted of the charge of murder and the view of the High Court, appears to us to be correct The acquittal of Kapil Deo and Ramapati, respondents in Criminal Appeal No 579 of 1976 thus must be and is hereby maintained, dismissing the Criminal Appeal No 579 of 1976

10 With regard to Criminal Appeal No 99 of 1987, it is significant to notice that the Government had not filed any appeal against the order of acquittal of the accused of the charge under Section 201 read with Section 34 I P C even though room had been kept in these proceedings to examine the question whether the accused could be convicted under Section 201 read with Section 34, I P C Still on careful consideration of the evidence and other material on record we are not pursuaded to take a different view than the one taken by the Court of Session Section 201, I P C provides that whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment or with that intention gives any information respecting the offence which he knows or believes to be false shall suffer imprisonments of that kind, mentioned in the three sub-portions of the provision, in the circumstances suggested

The trial Judge when grappling with the matter took note of the evidence of the witnesses of recovery, namely, Chander Shekhar, P W 5 and Sub-Inspector, Markandey Singh P W 11 wherefrom it was clear that a dead body was found inside a bag kept in the trunk That by itself was of no consequence and at best gravely suspicious Its finding was that a dead body in a bag put inside a trunk was recovered from a room of the house and further the part played by the accused in the placing of the dead body in that trunk was evidently not proved Their individual statement to P W 11 Markandey Singh "I have kept the dead body, could give it", which alone, if at all admissible, but not holding so, does not reveal any disappearance of evidence so as to screen the offender of murder This state of evidence is insufficient to prove the accused Kapil Deo and Ramapati to have placed the dead body in the trunk We see no reason to differ from the views expressed by the trial Judge, and which was a possible view, having regard to the evidence of Chander Shekhar and Markandey Singh, P Ws Besides the ratio in Duvvur Dasratharammareddy's case (AIR 1971 SC 1461) (supra) too comes in aid of the accused-respondents so as to merit dismissal of Criminal Appeal No 99 of 1987 as relating to them There is no evidence against Sheo Kumari accused of any kind worth discussing

11 For the foregoing reasons, we dismiss both the Appeals Nos 579 of 1976 and 99 of 1987

Appeals dismissed

1991 ALL. L. J 964

M L BHAT, J

Committee of Management Inter College, Karanda, Ghazipur and another, Petitioners v Deputy Director of Education & others, Respondents

Civil Misc Writ Petns Nos 1566 & 16282 of 1990, D/ 13-5-1991

(A) U P Intermediate Education Act (1921), S 16A(7) — Scope — Deputy Director Education cannot ask District Inspector of Schools to exercise powers under S. 16A(7). **(Para 18)**

(B) U P Intermediate Education Act (1921), S 16A(7) — Attestation of signature of Manager — No rival Managing Committees — Dispute set up by petitioners was not real but fanciful and imaginary — No challenge to election of Manager — Petitioners cannot challenge attestation of signature of Manager **(Paras 16 to 21)**

Cases Referred	Chronological Paras
1989 All LJ 273 (1989) UPLBE 178	13
1988 All LJ 1023 1988 UPLBEC 402	13
1985 All LJ 471	13

Tej Ram for Petitioners S C for Respondents

ORDER — These two writ petitions Nos 1566 of 1990 and 16282 of 1990 are decided by this common judgment

2 The facts in writ petition No 1566 of 1990 are as under —

The dispute relates to the managment of the Inter College, Karanda in district Ghazipur which is governed by the provisions of U P Intermediate Education Act 1921 It is stated that petitioner No 2 is the manager of the institution for the last more than 40 years. An election of the committe of Management is said to have been held on 5-7 1987 in which petition No 2 is said to have been elected as manager and one Shiv Nath Singh was elected as President. After the death of the President, Vice-President is working as the president of the management. The term for which the management committee is to function under the scheme of administration is three years. Consequently the term of the present managing Committee, will end in July, 1990 It is averred that respondent No 3 on the basis of some 'Farzi' election proceedings claims to have been elected as manager on 29-6-89 though he was not even a member of the General body and no such election was held. Two other persons, namely Ajit Kumar Singh and Tej Bahadur Singh also claim to have been elected manager of the institution Respondent No 2 after receiving all these election proceedings from these persons issued a notice to four persons on 11 7 89 A reminder was given on 31 7 89 to these four persons The four persons claimed that they were the managers of the institution, therefore, the dispute was referred to Deputy Director of Education, Varanasi region under S 16A(7) of the U P Intermediate Education Act Respondent No 1 directed respondent No 2 to submit his report in the matter and directed him to take action in accordance with the new scheme of administration Respondent No 2 wrote to respondent No 1 on 15-12-89 that dispute was going on between the rival committees of management On 21 12 89, respondent No 1 directed respondent No 2 to take action under S 16A(7) Respondent No 1 was himself authorised to take action He could not have directed respondent No 2 to exercise powers under S 16A(7) of the Act This order was passed without hearing the petitioners Acting on the said order respondent No 2 on 23-12-89 is said to have attested the signature of respondent No 2 as manager of the institution and recognized him as manager which in other words would mean that committee of management set up by respondent No 3 got recognition The order passed by respondent No 2 is said to be without jurisdiction and is passed at the back of the petitioners

3 Annexure-1 is the copy of the letter which is said to have been addressed by respondent No 2 to petitioner No 2 in which petitioner No 2 is styled as prabandhak, Inter College, Karanda, Ghazipur Some queries are raised in this letter about the institution and its management Annexure-2 is the copy of the letter by respondent No 2 to Ajit Kumar Singh and Tej Bahadur Singh who are also termed as Prabandhak Inter College, Karanda, Ghazipur Annexure-3 is the copy of letter addressed by respondent No 1 to respondent No 2 to submit his report in the matter and to take action is accordance with new scheme of administration By virtue of Annexure-5 dated 23-12-89 the signature of respondent No 3 is attested as manager

4 The petitioners claim in short is that there was a dispute between the rival committees of management That dispute was to be resolved by the Deputy Director of Education after giving reasonable opportunity to the parties of being heard and instead of that the Deputy Director of Education has passed an illegal order directing respondent No 2 to take action under S 16A(7) and on receipt of this order Respondent No 2 gave recognition to respondent No 3 as manager which could not be done because there was a dispute between the rival committees of management which was to be settled by respondent No 1 The action of respondent No 1 is said to be bad in law and violative of principle of natural justice

5 In their counter respondents have stated that the affairs of the institution are governed by a new scheme of administration w e f 15-2-85 It is stated that the new committee of management was constituted on 29-6-89 of which respondent No 3 was the manager Petitioner No 2 is said to have been manager of the institution for a pretty long time The last committee of management was constituted on 11 2-79 It was to last for three years only The election set up by the petitioners to have taken place on 5-7-87 is denied It is stated that election was held on 29-6-89 Notice for holding the election on 29-6-89 was duly given through newspapers and observer was appointed by respondent No 2 for conduct of the election

6 One Ajit Kumar Singh and Tej Bahadur Singh had initially staked their claim as manager They were given opportunity to prove their claim but they subsequently withdrew their claim and accepted respondent No 3 as the manager of the institution. As such there was no rival committees of management in the election dated 29-6-89 and the provisons of S 16A(7) of the Act could not be invoked There was no dispute whatsoever between the rival committee of management because there was no rival committee of management The only committee of management was that of which respondent No 3 was the manager This counter is filed on behalf of respondent No 2 also

7 Respondent No 3 has also filed a counter in his individual capacity He submits that he is the life member of the institution The last election of the management was held on 11 2 79 On 14-6 89 respondent by his letter asked the President of the Committee of Management to hold election of the managing committee on the basis of the approved administration scheme Copy of this letter is placed on record with the counter On 14 6-89 the president issued a notice to all the members of committee of management through registered letters and through newspapers, giving out programme for holding the election Copy of this notice is also placed on record One Uma Shankar Tiwari was appointed returning officer for the election One Kedar Nath Sahai was appointed as observer by respondent No 2 for the said election The election date was fixed as 29-6-89 Copy of this is also placed on record by respondent No 3 On 29-6-89 in presence of the returning officer and the observer respondent No 3 was elected as manager of the committee of management Eleven other persons were elected with the committee of management The election was duly approved by respondent No 2 by an order dated 23-12 89 Copy of which is placed on record There was no election on 5-7-87 as set up by the petitioners On 5 7-87 the previous managing committee approved the minutes of the previous meeting and directed that election be conducted. Which shows that no election was held on 5-7-87 The contents of the writ petition are denied and the same reply is given in the counter of the other respondents. It is submitted that provisions of S 16A(7) cannot be invoked.

8 In the other writ petition No 16282 of 1990 the petitioners have challenged an order passed by the District Inspector of Schools, dated 12 6 90 (Annexure-4 to the writ petition) By virtue of Annexure-4, respondent No 2 in writ petition No 16282 of 1990 has been directed to function as manager, but not to operate the accounts of the institution This direction is given to the respondents after having obtained opinion from the Standing Counsel in respect of the interim order dated 3 1 90 passed in writ petition No 1566 of 1990 This order also has been stayed on 28 8 90

9 The order dated 12-6 90 is challenged on the ground that the District Inspector of Schools was not competent to pass this order in view of the interim order dated 3 1 90 passed in writ petition No 1566 of 1990

10 In the counter respondent No 2 has denied the contents of writ petition No 16282 of 1990 and has stated that such an order could be passed because he was restrained from operation the accounts of the institution in question He has stated that he was duly elected manager therefore, he could manage the affairs of the institution and S 16A(7) was not applicable

11 Section 16A(7) of the U P Intermediate Education Act reads as under

"Whenever there is dispute with respect to the Management of an institution, persons found by the Regional Deputy Director of Education upon such enquiry as is deemed fit to be in actual control of its affairs may, for purposes of this Act, be recognized to constitute the Committee of Management of such institution until a court of competent jurisdiction directs otherwise

Provided that the Regional Deputy Director of Education shall, before making an order under this sub-section, afford reasonable opportunity to the rival claimants to make representation in writing

12 On the terms of the aforesaid provision it was contended by learned counsel for the petitioners that since there was a dispute between the rival committees of management and that dispute was to be settled by the Deputy Director of Education upon such enquiry as he deems fit and in determining the dispute he had to give reasonable opportunity to the rival claimants to make representations in writing The Deputy Director of Education could not ask the District Inspector of Schools to invoke the powers under S 16A(7) of the Act There fore, Annexure 4 is said to be without jurisdiction and Annexure-5 by virture of which respondent No 2 was given recognition as manager is also said to be without authority of law because if there was a dispute between rival committees of management, without determining that dispute respondent No 2 could not be recognized as manager of the institution

13 In support of his submissions learned counsel for the petitioners has referred to Maharshi Sukhdeo Vidyalaya Shukartal v Regional Deputy Director of Education, Meerut reported in 1985 All LJ 471, which shows that it is the jurisdiction of the Deputy Director of Education to decide the validity of election in case there is dispute between rival committees of management Reference is made to Committee of Management, Shri Gandhi Vidyapeeth Inter College, Ghatampur, district Kanpur Dehat v District Inspector of Schools reported in (1989) 1 UPLBEC 178 (1989 All LJ 273) Dispute between rival committees of management is to be decided by the Regional Deputy Director The District Inspector of Schools has no right to decide such dispute. The Committee of Management Bhakt Vatsal Inter College, Bichhwa District Mainpuri v The Regional Deputy Director of Education Agra, reported in 1988 UPLBEC 402 (1988 All LJ 1023) is another authority to the same effect It is held that if issue of actual control is inextricably mixed up with validity of election Deputy Director of Education has jurisdiction to examine validity of election also

14 The petitioners contention is that the election to the managing committee was held in July, 1987 However the District Inspector of Schools has denied that any election was held on 5-7 87 If any election was held on 5 7 87, the District Inspector of Schools would have been aware of that because on the basis of that election he was to authorise the manager elected in the said alleged election to operate on the accounts of the institution He was to attest the signature for functioning as manager No such thing is brought on the record by the petitioners by which it could be gathered that in fact election to the managing committee was held on 5-7 87 From the document available on record, it appears that in the meeting dated 5 7-87 it was decided that an election was to be held to the managing committee Whether any election was held to the committee of management is not revealed from any document except in the writ petition filed by the petitioners However, the contention of the petitioners that election was held in July, 1987 is emphatically denied by the respondents who represents respondents Nos 1 and 2 There fore, it cannot be assumed that any election was held in July, 1987 By virtue of the scheme of administration the life of the committee of management is only three years and after three years fresh election was to be held for constitution of new committee of management Assuming, not admitting or holding that any election was held in July, 1987 the term of the alleged managing committee has also expired in July, 1990 but as a matter of fact no election seems to have taken place in July, 1987 The petitioners appear to have continued to hold the management of the institution by virtue of the election held in February, 1979 1987's election as set up by the petitioners has not

been held, nor is there any proof that such an election was held Three persons, namely Ajit Kumar Singh and Tej Bahadur Singh and the petitioner No 2 could not have been elected managers of that committee of management simultaneously Law countenances only one manager and not the three simultaneously This by itself belies the contention raised by the petitioner that any election was held on 5-7 87 in which petitioner No 2 was elected as manager of the institution The petitioners have not brought on record any thing about the holding of election on 5-7-87 or the manner in which such an election was held or any official communication by which signature of the manager was attested by the competent authority in order to enable him to operate on the funds of the institution As already said what is decided in the meeting dated 5-7-87 was the need to hold the election of the institution Whether such an election was held has not been proved

15 Ajit Kumar Singh and Tej Bahadur Singh have withdrawn their claim which they had set up The petitioner No 2 claims that he is manager on the basis of a letter written to him by the District Inspector of Schools on 11-7 89 in which he is termed as prabandhak Merely because a query was made and he is named as Prabandhak it cannot be concluded that he was manager elected inthe alleged election dated 5-7-87 The District Inspector of Schools is said to have addressed a communication dated 14-6-89 to the president for constituting a new committee of management and in pursuance of this communication election dated 29 6-89 is said to have been held. Therefore, if election was held on 29-6-89 petitioner No 2 could not be manager of the institution. There is no reason to disbelieve the counter-affidavit of the District Inspector of Schools who has categorically stated that there was no election on 5-7-87 of the institution, but the election if any, was held on 29-6-89 in pursuance of the direction of the District Inspector of Schools The election of 29-6-89 in which respondent No 2 is said to have been elected as manager is not challenged by the petitioners There is no prayer that the said election, be set aside on the ground of its being held in violation of law Because if election was held on 5 7 87 it was open to the petitioners to challenge the election held on 29-6 89 No such ground is urged in the writ petition nor is it stated that election dated 29 6-89 as a matter of fact could not be held What is stated is that a 'Farzi' election proceedings were submitted before the District Inspector of Schools This Court will not hold the proceedings which culminated in election dated 29 6-89 as 'Farzi' Merely because the petitioners have chosen the term for the said election as Farzi' the election dated 29-6 89 could not be declared bad if there was no factual basis laid by the petitioners in respect of the fact that the election of the committee of management was already held on 5 7 87 and the District Inspector of Schools had no authority to order a fresh election in June 1989

16 If the election held on June 1989 is not challenged or not prayed to be quashed the said election could not be held to be bad merely because the petitioner No 2 was manager in the election that was held in 1979 After the election of June, 1989, the petitioner No 2 had ceased to be the manager of the institution Therefore, it cannot be said that he was manager of the rival committee of management because that managing committee of which he claims to be a manager had ceased to exist from 29 6-89, 5 7 87's election had not been held, nor is there any proof that those elections were held. If that was so the petitioners could claim a writ of mandamus against the respondents asking them to respect the election of 5 7-87 That relief also is not claimed

17 As a result of the aforesaid discussion, I have no hesitation in holding that July, 1987's election was not held On the other hand elections set up by the respondents which is said to have been held on 29-6-89 is proved to have been held. That election is not challenged. That election is said to have been Farzi' but that would not solve the problem of the petitioners unless they had

specifically challenged the election of 29-6-89 They do not seek any declaration with regard to the alleged election of July, 1987 In the absence of any prayer in the writ petition for quashing the election of June 1989 on the ground that election was already held in July, 1987 which was to be respected, it cannot be held that elections held in June, 1989 did not take place or they were bad in any manner

18 The petitioners seem to be aggrieved against the letter addressed by respondent No 1 to respondent No 2 for taking action under S 16A(7) of the Act. That letter seems to be redundant. No such direction could be given to the respondent No 2 by respondent No 1 If there was a dispute which was real and not imaginary respondent No 1 was himself authorised to deal with the matter under S 16A(7) of the Act Since there was no dispute with regard to the election of June, 1989 nor was there any rival committee of management elected, therefore, there was no need for taking action under S 16A(7) of the Act The impugned letter dated 21 12-89 is therefore, a redundant letter which would not bring into existence the rival managing committee as set up by the petitioners if it did not as a matter of fact exist Respondent No 2 has not relied on the letter of 21 12-89 He had only written in reply to that letter of respondent No 1 that managing committee was constituted on 29-6-89 and he has attested the signature of the manager Respondent No 2 does not say that he has been permitted to attest the signature of respondent No 3 in terms of letter dated 21-12-89 received by him from respondent No 1 nor does he say that he was exercising his jurisdiction under S 16A(7) of the Act. Therefore, it is incorrect to suggest that respondent No 2 has, in exercise of his power under S 16A(7) and in pursuance of the letter received from respondent No 1 dated 21-12-89, attested the signature of respondent No 3 However, it is true that respondent No 1 could not and should not have asked respondent No 2 to exercise power under S 16A(7) of the Act because jurisdiction to pass any order under that Section is exclusively vested in respondent No 1 The letter dated 21 12-89 is therefore, redundant. The said letter was not acted upon by respondent No 2 He granted recognition to respondent No 3 as manager independently of that letter He may have mentioned that letter but he has not said that I am exercising jurisdiction on the basis of that letter He could not exercise jurisdiction did not belong to him The authorities cited by learned counsel for the petitioners lay down the correct law There is no dispute over the proposition which is laid down in the said authorities Independent of those authorities S 16A(7) of the Act itself postulates that a dispute between rival committees of management is to be considered and settled by the Deputy Director of Education and not by the District Inspector of Schools In this case the District Inspector of Schools has not exercised his power under S 16A(7) of the Act. In fact he informs the respondent No 1 in reply to his letter dated 21-12-89 that managing committee was constituted on 29-6-89 and he was attesting the signature of respondent No 3 So the contention of the petitioners that respondent No 2 has attested the signature of respondent No 3 in pursuance of the letter dated 21 12 89 received by him from respondent No 1 is incorrect. By reading the two communications i e dated 21-12 89 and 30-12-89 it becomes manifestly clear that respondent No 1 should not have asked respondent No 2 to exercise the powers under S 16A(7) of the Act. It also emerges that respondent No 2 has not exercised any power under S 16A(7) of the Act, nor has he attested the signature of respondent No 3 on the basis of that letter There is no violation of law committed by respondent No 2 in attesting the signature of respondent No 3

19 The jurisdiction under S 16A(7) can be exercised by respondent No 1 when there is real dispute between the two rival committees of management. If the dispute is imaginary fanciful or without any basis, he is not bound to exercise the jurisdiction under S 16A(7) of the Act From the record it

emerges that only one committee of management was constituted in the election which was held on 29-6 89 There was no basis for any election to have taken place on 5 7 87 In the election that had taken place on 29-6-89 no other committee of management except the managing committee of which respondent No 3 is manager has been constituted. Petitioner No 2 can, therefore not raise a fanciful or imaginary dispute about the managing committee which came into existence in the election held on 29 6-89 Two more persons had claimed to be the managers of the managing committee but they subsequently withdrew their claim. There was no real dispute about the said committee of management which could be referred to the Deputy Director of Education for being resolved There was only one managing committee which was duly elected and those elections have not been challenged or prayed to be set aside The election held on 29 6 89 have therefore, become final and no dispute can be entertained with regard to the election dated 29-6-89 Merely, terming petitioner No 2 as Prabandhak in a communication dated 8 12 89 (Annexure 1) it cannot be said that he was Prabandhak in accordance with law The term of the managing committee of which petitioner No 2 was the manager had expired long ago From the Scheme of Administration of 1985 it emerges that term of the managing committee was only three years Even if the managing committee of which petitioner No 2 was a manager is held to be constituted by operation of law in 1985, still its term expired in 1989 In 1989 he could not claim to be a manager of the rival committee of management Therefore, he has raised an imaginary dispute which was unreal and not based on any evidence because the alleged election which is said to have taken place on 5-7-87 is held not to have been taken place in this judgment. Therefore by no stretch of imagination the petitioners could be held to be rival managing committee or manager of the said committee S 16A(7) postulates settlement of a dispute by the Deputy Director of Education which is a real and not imaginary The dispute set up by the petitioners as being managing committee and manager is not real but appears to be fanciful and imaginary Perhaps because of that they have not challenged the election held on 29-6-89 in which respondent No 3 was elected as manager

20 Taking the entire circumstances of the case into consideration it is held that managing committee had come into existence on 29-6-89 and there was no rival managing committee in existence on that date under law There fore there was no dispute between the two rival committees of management which could be resolved under S 16A(7) The only managing committee which was duly elected came to be in existence on 29-6-89 The letter of respondent No 1 to respondent No 2 of course is not in accordance with law but that would not affect the jurisdiction of respondent No 2 to attest the signature of respondent No 3 who was duly elected as manager in the meeting dated 29 6 89 The letter dated 21 12 89 has not been acted upon, nor followed by respondent No 2 therefore that letter should be treated as non est and redundant

21 Without challenging the validity of the election dated 29 6 89 the petitioners can not challenge the attestation of signature of respondent No 3 If those elections are held valid then the signatures of respondent No 3 are to be attested The petitioners do not pray for quashing of those elections nor they seek any declaration with regard to the election of 5 7-87 therefore, it is not possible for this court to hold that respondent No 3 was not duly elected It also cannot be held that the petitioners belong to rival committee of management The petitioners could not continue in office by virtue of election held in June 1989 for indefinite period The election held on 29 6-89 cannot be held to be a Farzi without any proof

22 Learned counsel for the parties requested this court to decide these writ petitions finally because pleadings of the parties were complete Acceding to their request I am deciding these writ petitions finally

23 Writ petition No 1566 of 1990 deserves to be dismissed and is accordingly dismissed The interim order dated 3-1 90 stand vacated

24 Writ petition No 16282 of 1990 is a follow up writ petition. By the impugned order in this writ petition respondent No 2 who is respondent No 3 in Writ petition No 1566, of 1990 was put incharge of the management of the institution as manager However he is not permitted to operate the accounts of the institution If the election of respondent No 2 is held to be valid and assertions of the petitioners in writ petition No 1566 of 1990 are held to be not substantiated, then the present writ petition No 16282 of 1990 also deserves to be dismissed Moreover respondent No 1 seems to have acted on the advice of the Standing Counsel therefore he cannot be blamed for making a provision for the management of the institution The writ petition is based on the interim order dated 3 1 90 in writ petition No 1566 of 1990 which has been vacated now therefore, the present writ petition also is dismissed and the interim order dated 28 8 90 shall stand vacated

Petition dismissed

1991 ALL. L. J 971

B L YADAV, J

Bhagwat Prasad Appellant v Jitendra Narain and another, Respondents

First Appeal From Order No 17 of 1990 D/- 29 4-1991 *

Civil P C (1908), O 39, R. 1(c) — Temporary injunction — Grant of — Plaintiff found in possession of suit property — Plaintiff would suffer irreparable loss if trees standing in suit property cut off by defendant — Grant of temporary injunction restraining defendants from interfering with possession of plaintiffs and from cutting off trees considering balance of inconvenience and injury to plaintiffs — Not illegal

(Para 8)

Cases Referred Chronological	**Paras**
AIR 1981 SC 1426	7
1865 LR (PC) 50 Walker v Jones	5

Sheo Kumar Singh and Vinod Kumar Singh for Appellants

JUDGMENT -- This is an FAFO against the judgment and order dated 22 9-89 granting temporary injunction in a suit filed by the plaintiff respondents against the defendant appellant alleging that the plaintiffs were owners and their names were mutated in place of one Ram Krishna the recorded tenure holder and that the plaintiffs have no rights

2 The suit was contested by the defendants denying the plaint allegations and alleging that the plaintiff had obtained a will from the owner Ram Krishna on 1 3-88 and the application for temporary injunction was filed on the ground that the plaintiffs and their co-sharers were in possession over the land in dispute which contained trees also Consequently the temporary injunction was granted by the court below

3 Learned counsel for the appellant urged that there was no evidence filed by the plaintiffs to prove their possession and prima facie title and the court below has not recorded any finding of possession in favour of the plaintiffs consequently the temporary injunction cannot be granted

4 Having heard the learned counsel for the appellant, suffice it to say that the court below has taken into account the Khatauni extracts of 1394 to 1399 Fasli filed by the plaintiffs and in those extracts in place of the deceased Ram Krishna over Khata Nos 391 and 482 the name of Sharda Prasad plaintiff No 2 and one Mool Chand were recorded by the order of Assistant Consolidation Officer dated 30-5-88 The defendants plaintiffs have filed irrigation slip and the court below has relied upon the Khatauni extracts of 1394 to 1399 in Fasli showing primafacie title of the plaintiffs A finding has been recorded that the persons recorded in revenue papers must be deemed to have prima facie title and consequently plaintiffs were recorded in revenue papers by the order of Assistant Consolidation Officer dated 30-5 88 The title has been prima facie held in favour of the

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*Against the judgment & order passed by Sri R S Pande Addl. Dist J Banda, D/- 22 9 1989 plaintiffs and on that basis possession of the plaintiff has been assumed.

5 The temporary injunctions are granted under the provisions of Order 39, Rules 1 & 2 of the Code of Civil procedure and also under the inherent provisions of Section 151 of the Code The power to grant temporary injunction is discretionary to be exercised on sound judicial principles Broadly speaking the object of granting temporary injunctions is to maintain status quo while parties are litigating for their title But at the same time it is not to be lightly The prima facie case, balance of inconvenience and irreparable loss are the principles to be borne in mind in case injunction is not granted. In respect of prima facie case the court has to satisfy that there is a fair and substancial question to be decided It is better to refer to an observation of Turner, L J in Walker v Jones 1865 LR (PC) 50 as follows —

"The real point is not how the question ought to be decided at the hearing of the cause but whether the nature and difficulty of the question is such that it was proper that the injunction should be granted until time for deciding them should arrive

6. Just prima facie case is not sufficient for granting injunction, but at the same time balance of inconvenience or otherwise causing injury to plaintiff and irreparable loss must also be proved In matters of immovable property the disturbance of status quo ante results in substantial loss to the plaintiff in possession This is how the question of possession becomes important. On the basis of revenue papers entries court has held that plaintiff was in possession Under sub-clause (c) of Rule 1 Order 39 the expression is that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in suit The expression 'cause injury' to the plaintiff has not been explained In fact, injury means any wrong or damage done to another either in his person, right, reputation or property (See Black's Law Dictionary, 4th Edn. page 924) In other words, it connotes an act which harms hurts or damages

7 In United Commercial Bank v Bank of India AIR 1981 SC 1426 it was ruled that in order to obtain relief of temporary injunction the plaintiff must prove that they would be put to an irreparable loss unless an interim injunction was granted.

8 In the present case the court below appears to be conscious about these principles of prima facie case, injury to plaintiff and balance of inconvenience etc and as some trees were also standing and in case these trees were cut either by the defendants or by the plaintiffs, in that case the plaintiff would suffer irreparable loss Under these circumstances, the temporary injunction has been correctly granted restraining the defendants from cutting the trees and from interfering with possession of the plaintiffs and their co-sharers The court below has not committed any error of law and no interference is required

9 The present appeal lacks merit and the same is dismissed

Appeal dismissed

1991 ALL. L. J 972

V K KHANNA AND
G D DUBE, JJ

Khursheed Husain, Petitioner v District Magistrate & Collector Bareilly and others, Respondents

Civil Misc Writ petition No 16399 of 1990, D/ 22-8-1991

U P Kshettra Samitis and Zilla Parishads Adhiniyam (33 of 1961), S 15(3) — Motion of no-confidence against Pramukh — Motion

JI/JL/A1113/91/VSM

initiated by requisite number of members — Inaction of Collector to fix a date within days of giving of notice of motion of no confidence — Entire proceedings for consideration of the motion of no-confindence vitiated

(Para 7)

Cases Referred	Chronological Paras
WP No 11791 of 1990 D/- 6 8 1991 (All)	3

Sri Navin Sinha, for Petitioner S C for Respondents

V K KHANNA, J — The petition in this writ petition is the duly elected pramukh of Kshetriya Samiti Bhaujipura district Bareilly A notice for motion of no-confidence was given to the Collector Bareilly on 17-3-1990 by respondent No 3 which was supported by other members of Kshetriya Samiti as well. The Collector, Bareilly at the first instance verified the signatures of the members who were said to be supporting the notice for motion of no-confidence The meeting for consideration of motion of no confidence was actually fixed for 2nd July 1990 At the admission stage counter has been filed on behalf of contesting respondent Mahendrapal Singh to which rejoiner affidavit has also been filed, and so the present writ petition is being disposed of finally in accordance with the rules of the court

2 List has been revised, counsel for the petitioner is present However, no one is present on behalf of contesting respondent No 3 Standing counsel is present on behalf of respondents 1 and 2

3 Learned counsel for the petitioner has urged only one point in this respect. It has been argued that in view of the specific provision of S 15(3) of the U P Kshettra Samitis and Zilla Parishads Adhiniyam 1961, the meeting was to be held not later than 27th April 1990 and the meeting having been held on 2nd July 1990 the entire proceedings for consideration of the motion of no-confidence are vitiated Reliance has been placed on an unreported decision of this court bearing writ petition No 11791 of 1990, Prabha Shankar Paliwal v State of U P , and others decided on 6th August, 1991

4 For the purpose of deciding controversy raised in this writ petition it will be useful to quote the relevant part of S 15(3) of the Adhiniyam, 1961 which runs as follows

> (3) The Collector shall thereupon —
>
> (i) convene a meeting of the Kshetra Samiti for the consideration of the motion at the office of the Kshetra Samiti on a date appointed by him, which shall not be later than thirty days from the date on which the notice under sub-section (2) was delivered to him, and
>
> (ii) give to the members of the Kshetra Samiti notice of not less than fifteen days of such meeting in such manner as may be prescribed
>
> Explanation In computing the period of thirty days specified in this sub-section, the period during which a stay order, if any issued by a competent court on a petition filed against the motion made under this section is in force plus such further time as may be required in the issue of fresh notices of the meeting to the members shall be excluded

5 For the purpose of finding out as to whether any benefit could be given under the explanation to S 15(3) of the Adhiniyam, 1961 time was granted to produce the original record pertaining to this case The original record has been produced by the standing counsel before us and we have examined the same From the perusal of the record it looks that a hunger strike was resorted by some members of the Kshettra Samiti and on 12th June 1990 nine members have a representation to the District Magistrate Bareilly bringing to his notice that an indefinite hunger strike is going on since 11th June, 1990 on the ground that no legal action has been taken on the notice which has been given on 27th March, 1990 for bringing a motion of no-confidence against the Pramukh of Bhaujipura Kshettra Samiti Bareilly It is on this that the District Magistrate Bareilly on 13th June 1990 passed the following order —

"Dinank 2 July 1990 ke liye nirdharit kiya jata has vilamb ke liye bhi uttardayitwa nishchit kiya jave

Sd. Illegible
13-6-90

6 From the aforesaid order passed on 13th June 1990 it is clear that date of 2nd July 1990 have been fixed on the representation made by 9 persons and the authority fixing the date was also conscious of the fact that the meeting has not been held within the stipulated time and for that purpose had directed that responsibility be fixed on the person who are responsible for the dela, A bare perusal of the mandatory provision of S 15(3) would show that so far as the notice which has been given on 27th March, 1990 a meeting could be held only after 27th April 1990 As far as the representation which has been given on 12th June 1990 and has been signed by 9 persons, that could not be treated as a valid notice under S 15(3) of Adhiniyam, 1961 in as much as the notice was not signed by at least half of the total members of the Kshettra Samiti i.e 47 members The fixing of date 2nd July 1990 on the aforesaid notice dated 12th June, 1990 could not be in consonance with provisions of S 15(2) and (3) of the Adhiniyam, 1961 In these circumstances we are of the opinion that the meeting which has been held on 2nd July 1990 is not a valid meeting and the entire proceedings held in the aforesaid meeting are liable to be quashed It is however, being made clear that it will be open for the members to move another motion of no confidence in case they gave notice in accordance with the provisions laid down in S 15(2) of the U P Kshettra Samitis and Zila Parishads Adhiniyam 1961

7 Before parting in this case we may observe that a very valuable right which has been conferred on the members of the Kshettra Samiti could not be utilised because of the inaction of the competent authority who was to take a decision in this matter This fact is also evident from the order which has been passed on 13th June 1990 in which the competent authority while fixing date has ordered responsibility be fixed on the person who was responsible for causing delay The original record has been produced before us and it does not appear that any action in this matter has been taken. In our opinion this is a very serious matter and a motion of no confidence which is initiated by requisite number of members cannot be allowed to become infructuous only because of inaction of competent authority wo has to fix a date within thirty days of the giving of the notice of motion of no confidence A copy of our judgment will, therefore be sent to the Chief Secretary of the State of U P forthwith for taking appropriate action in this matter and also to issue appropriate directions so that such lapse does not occur in future

8 For the reasons stated above the present writ petition is allowed and the entire proceedings of meeting held on 2nd July, 1990 are quashed However looking in the facts and circumstances of the case the parties shall bear their own costs

Petition allowed

1991 ALL. L. J 974

D P S CHAUHAN J

Bhagwati Prasad and another Petitioners v Commissioner, Allahabad Divn and another Respondents

Civil Misc Writ Petition No 26079 of 1990. D/ 7 5-1991

(A) Constitution of India, Art. 226 — Public interest litigation — Locus standi — Writ petition challenging order passed by Commissioner, under U.P Panchayat Raj Act, setting aside suspension of Pradhan — Petitioner, a member of Gaon Sabha — Petitioner cannot be allowed to maintain petition as public interest litigation

Case law discussed

U P Panchayat Raj Act (26 of 1947), S. 95(gg).

G I/HI/A729/91/JJS

(B) Constitution of India, Art. 226 — Alternative remedy — Notification issued by State Govt under U P Panchayat Raj Act making — Order of Sub-Divisional Officer suspending Pradhan revisable by Commissioner and also by State Govt — Order passed by Commissioner in revision — Writ petition against — Not liable to be dismissed on ground of alternative remedy of second revision before State Govt.

U P Panchayat Raj Act (26 of 1947), S. 96A.

Where the notification issued by the State Government under U P Panchayat Raj stated that it was the order of the sub-divisional officer suspending the Pradhan that was made revisable by the Commissioner and also by the State Government and no other order moment the order of Sub-Divisional Officer was set aside in revision by the Commissioner the same became non est and there was no question of further revising the same by the State Government Consequently the writ petition challenging order of the Commissioner would not be liable to be dismissed on the ground of alternative remedy of second revision before the State Govt Further, the order of the Sub-Divisional Officer got merged in the order of the Commissioner passed in revision notwithstanding the fact whether the Commissioner had affirmed the order of the Sub-Divisional Officer or set aside the same and thus when the order of the Sub-Divisional Officer gets merged into the order of Commissioner then, under the said notification, there was no question of further revision against the same before the State Government Moreover if the words and also in the notification are interpreted as 'and further then the order of the Commissioner becomes revisable, but such a meaning would be contrary to the context of the notification which has made only the order of the Sub-Divisional Officer revisable

AIR 1962 SC 1513 AIR 1970 SC 1, Foll.

(Paras 20, 21, 22)

(C) U P Panchayat Raj Act (26 of 1947), Ss 95(g), 95(gg) — Suspension of Pradhan — No enquiry proceedings under Cl. (g) set in motion against him — Order of suspension null and void

(Para 28)

(D) U P Panchayat Raj Act (26 of 1947), S 95(4) Proviso (ii) — Suspension of Pradhan — No opportunity required under law to be given

Constitution of India, Art. 226.

(Para 30)

(E) Constitution of India, Art 226 — Finding of fact — Suspension of Pradhan of Goan Sabha — Revision against, before Commissioner — Finding of facts by Commissioner that order of Sub-Divisional Officer suspending the Pradhan was not just on grounds given thereunder — Cannot be interfered under Art. 226.

U P Panchayat Raj Act (26 of 1947), S. 95(gg).

(Para 30)

Cases Referred Chronological	**Paras**
AIR 1991 SC 420	17
AIR 1986 SC 847	17
AIR 1984 All 46 (FB) 1983 UPLBEC 756	17
1984 Lab IC 560 AIR 1984 SC 802	17
AIR 1982 SC 149	16
1980 Lab IC 560 AIR 1981 SC 344	16
AIR 1970 SC 1 (Foll)	21
AIR 1962 SC 1513 (Foll)	21

Radhey Shyam, for Petitioner, S C for Respondent

ORDER — Gaon Sabhas, which have been established with a view to develop local self-government in the rural area, owe their existence to the U P Panchayat Raj Act, 1947 (for brevity, hereinafter referred to as the Act)

2 There is a Gaon Sabha in the district of Allahabad known as Goan Sabha Kalaranpur (for brevity hereinafter referred to as 'the Gaon Sabha) Respondent No 2 is its elected Pradhan.

3 The Act conferred on the State Government certain powers of control and supervision over the Gaon Sabhas and the

office bearers which find enumeration in S 95 where under clause (g) gives the power of removal of the persons as mentioned therein including the Pradhan who is one of the office bearers of the Gaon Sabha Likewise, under clause (gg), the power for the suspension of the persons as mentioned therein including the Pradhan is given

4 The State Government, in exercise of its power under S 96A of the Act delegated its power under clause (g) as well as under clause (gg) of sub-section (1) of S 95 of the Act through separate notifications. The power under clause (gg) was delegated to the Sub-Divisional Officer having jurisdiction subjecting the same to the scrutiny by the Commissioner of the Division as well as by the State itself vide notification No 5681 8/XXXIII 2 237 72 dated October 14, 1976 (published in U P Gazette, Part I, dated October 30, 1976) which reads as under —

> "In exercise of the powers under S 96A of the U P Panchayat Raj Act, 1947 (U P Act No 26 of 1947) read with S 21 of the U P General Clauses Act, 1904 (U P Act No 1 of 1904) and in supersession of Government notification No 16/7-8/XXXIII 23/72 dated August 12, 1974 the Governor is pleased to delegate the powers of the State Government under clause (gg) of sub-section (1) of S 95 of the said Act to the Sub-Divisional Officer having jurisdiction subject to the condition that any order passed by the Sub-Divisional Officer in exercise of the said power, either before or after the date of this notification, shall be revisable by the Commissioner of the Division and also by the State Government

5 The Sub-Divisional Officer, Soron (for brevity, hereinafter referred to as 'the Sub-Divisional Officer'), in purported exercise of the powers under clause (gg), passed an order, on 18-7-1990 Suspending the respondent No 2, Pradhan of the Gaon Sabha. This order was challenged by way of revision No 23 of 1990 by the Pradhan before the Commissioner Allahabad Division Allahabad (for brevity hereinafter to be referred to as 'the Commissioner') who, while maintaining the order, so far as the same related to the decision for setting up an enquiry against the Pradhan, set aside the same so far the same related to his suspension vide his order dated 18-9-1990 This order of the Commissioner is the subject matter of the present writ petition whereunder the relief for its quashing is prayed for

6. The facts, in brief, are —

(a) The respondent No. 2, the Pradhan of the Gaon Sabha on the basis of the report of the Naib Tehsildar Soron, dated 18-7 1990, was suspended the same day by the Sub-Divisional Officer and this order of suspension was passed at the stage of formation of opinion by the Sub-Divisional Officer for taking proceedings against the Pradhan under clause (g)

(b) The Naib Tehsildar's report, as aforesaid, was regarding the activities of the Pradhan about his encroachment over the Banjar land of the Gaon Sabha in plot No 232 by making a manure pit and placing a thatch thereover and it also contained allegations about annexation by the Pradhan in his chak the chak road of plot No 318 and the water channel in plot No 323 as well as for allowing illegal construction over the land of the Gaon Sabha by permitting the person illegal occupation thereover

7 The writ petition, as initially filed, was on behalf of the two persons but on account of it having been dismissed by this court on behalf of the petitioner No 1, who was the Up Pradhan of the Goan Sabha, survived on behalf of the petitioner No 2 who is one of the members of the Gaon Sabha During the course of the consideration of the matter regarding vacation of the ex parte interim order, the parties insisted upon the final disposal of the writ petition itself as counter and rejoinder affidavits had already been exchanged and the matter is cognizable by the single judge In the circumstances, with the consent of the parties, I propose to decide the petition itself

8 Heard learned counsel for the petitioner, Sri Pradeep Chandra, learned counsel for the respondent No 2, Sri Radhey Shyam as also the learned standing counsel at longum

9 Learned counsel for the petitioner submitted that the Commissioner has acted illegally while interfering with the order of Sub-Divisional Officer which was just and the grounds for interference by the Commissioner are unsustainable in law

10 Learned counsel for the respondent No 2 resisting the claim of the petitioner, raised four-fold objections, which are preliminary in nature —

(i) Firstly, the petitioner has no locus standi to maintain the petition,

(ii) Secondly the petitioner having failed to avail the alternative remedy by way of revision before the State Government, cannot maintain the petition

(iii) Thirdly, the order of Sub-Divisional Officer dated 18-7-1990 which has been set aside by the commissioner, was void having been passed without satisfying the requirement of law and restoration of such an order would not be in the interest of justice and, in the circumstances, no writ can be issued, and

(iv) Fourthly, the findings of the Commissioner being based on the material on record are findings of facts and cannot be interfered with the exercise of jurisdiction under Art. 226 of the Constitution of India as the Commissioner had held that the suspension of the Pradhan was not reasonable

11 The submissions so made by the counsel for the parties related to the questions of law and facts have only peripheral relevance in determining the same I propose to consider the objections as raised by the learned counsel for respondent first.

12. The first objection as raised by the learned counsel for the respondent is regarding the locus standi of the petitioner to maintain the petition and in support whereof he has submitted that the petitioner, who is only a member of the Goan Sabha, has, in the present writ petition, challenged the order passed by the Commissioner setting aside the suspension of the Pradhan and by this order he is not in any way affected and none of his personal rights have been put in jeopardy He was not a party before the Commissioner in revision According to him, the petitioner has invoked the jurisdiction of this court on account of personal grudge and enmity with the respondent No 2 and for satisfying his personal gain as the Pradhan filed an objection under 9A(2) of the U P Consolidation of Holding Act 1953 before the Consolidation authority, Soron against the petitioner Nanha Lal and one Om Prakash, who unlawfully occupied the Goan Sabha land on the basis of farzi Amaldaramad so as to grab the same On the basis of the report of the Assistant Consolidation Officer dated 25-2 1985 the matter is pending before the Consolidation Officer for adjudication This fact is admitted in the rejoinder affidavit by the petitioner, but the plea taken is that the matter before the consolidation authority related to title dispute The petitioner has, thus, come to this court for wrecking his personal vengeance and satisfying his personal interest so that by getting the Pradhan under suspension, he may have easy sailing before the consolidation authority as the U P Pradhan, who joined him in the present petition, is in collusion with him

13. Learned counsel for the petitioner took the stand that the petitioner is a person who reported the matter to the Sub-Divisional Officer against the Pradhan that the Pradhan is getting the constructions illegally made over the Gaon Sabha land of plot No 262 in village Tulsipur by permitting Sri Chhedi Lal Gupta and as such he is a person interested in the matter

14 Learned counsel for the respondent No 2 submitted that without admitting anything, even if the petitioner reported the matter to the Sub-Divisional Officer against the Pradhan, even then he cannot be said to have a locus standi in the matter so as to approach this court against the order of the Commissioner whereby none of his personal rights have been affected and at the most he can be a witness in the enquiry against the

Pradhan, if any conducted under Clause (g) of sub-section (1) S 95 of the Act. It was after this that the learned counsel for the petitioner took the stand that he has approached this court in the capacity of a public interest litigation.

15 Goan Sabha is a body corporate in whom the property of the Gaon Sabha is vested. Goan Panchayat of which the Pradhan is the ex-officio Chairman, though not its member, having no right of vote except in the situation of there being a tie and that too in the matters other than election, is the executive body of the Goan Sabha entrusted interalia with the task to remove encroachment over the public street, public palces and property vested in the Goan Sabha, but the Gaon Sabha has not taken steps in the matter Apart from this Gram Panchayat also acts as Land Management Committee and in this capacity it is charged with the general management, supervision and control over all the property of the Goan Sabha but even the land management Committee has not taken any proceeding against the Pradhan Under the law, the Pradhan is liable to pay surcharge imposed by the Prescribed authority for the loss, waste or misapplication of the money or property belonging to the Gaon Sabha, if such loss, waste or misapplication is the direct consequence of his negligence or misconduct. These facts go to establish that sufficient safeguard has been provided by the Act for the preservation and protection of the property of the Gaon Sabha.

16 However, the learned counsel for the petitioner in support of his submission that he has approached this court by means of the present writ petition in the capacity of a public interest litigation for which he has placed reliance on the case of the Supreme Court in the case of S P Gupta v President of India, AIR 1982 SC 149 and relied on the following passage at Page 194

"22 We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision This is absolutely essential for maintaining the rule of law furthering the cause of justice and accelerating the pace of realisation of the constitutional objective "Law" as pointed out by Justice Krishna Iyer in Fertilizer Corporation Kamgar Union v Union of India, AIR 1981 SC 344 (1980 Lab IC 1367) is a social auditor and thus audit function can be put into action when some one with real public interest ignites the jurisdiction

In the present case since the Act itself has provided for the redressal of any injury to the property of the Gaon Sabha through the machinary created thereunder as well as under the U P Zamindari Abolition and Land Reforms Act 1951 no breach of public duty or violation of the provisions of the Constitution or law has been stated either in the petition or canvassed during the course of argument

17 However the Supreme Court while holding the principle that the Court has to invent new methods and new strategy for the purposes of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning, has observed that —

But we must hasten to make it clear that the individual who moves the court for judicial redress in cases of this kind must be acting bonafide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be activised at the instance of such person and must reject his application at the threshhold, whether it be in the form of a letter addressed to the Court or even in the form of a reguler writ petition filed in court "

He has also made a reference of the case of Bandhua Mukti Morcha v Union of India, AIR 1984 SC 802 and also of State of

Himachal Pradesh v Ummed Ram AIR 1986 SC 847 and also the case of Full Bench of this Court Umesh Chand Vinod Kumar v Krishi Utpadan Mandi Samiti, 1983 UPLBEC 756 (AIR 1984 All 46) Those cases, in the background of the facts of the present case have no relevance as the present case is covered by the following observation of the Supreme Court made in Subhash Kumar v State of Bihar AIR 1991 SC 420 at Page 424

"Public interest litigation cannot be invoked by a person or body of person to satisfy his or its personal grudge and enmity If such petitions under Article 32 are entertained it would amount to abuse of process of the Court, preventing speedy remedy to other genuine petitioners from this court. Personal interest cannot be enforced through the process of this court under Art. 32 of the Constitution in the garb of a public interest litigation Public interest litigation contemplates legal proceedings for vindication or enforcement of fundamental rights of group of persons or community which are not able to enforce their fundamental rights on account of their incapacity poverty or ignorance of law A person invoking the jurisdiction of this court under Art 32 must approach this court for the vindication of the fundamental rights of affected persons and not for the purpose of vindication of his personal grudge or enmity It is duty of this court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants invoking the extraordinary jurisdiction of this court for personal matters under the garb of the public interest litigation.

18 Thus it is not a case where the petitioner can be allowed to maintain the petition as a public interest litigation

19 The second submission of the learned counsel for the respondent is regarding non-availing of alternative remedy by the petitioner as provided under the aforesaid notification by way of revision before the State Government as, according to him, the order passed by the Commissioner in revision is further revisable by the State Government. Thus the question for consideration is whether under the said notification, two revisions are provided and the order of the Commissioner is further revisable by the State Government

20 A bare perusal of the notification reveals that it is the order of the Sub-Divisional Officer suspending the Pradhan is made revisable by the Commissioner and also by the State Government and no other order Moment the order of Sub-Divisional Officer is set aside in revision by the commissioner the same becomes non est and there is no question of further revising the same by the State Government However the things would be necessary for consideration in the matter —

(i) regarding the position of the merger of the order of the Sub-Divisional Officer in the order of the Commissioner passed in revision

(ii) regarding the meaning of the words and also used in the said notification and whether these words can mean and further

21 The question of merger came up for consideration in Madan Gopal Rungta v The Secretary to the Government of Orissa, AIR 1962 SC 1513 In that case the order of the State Government rejecting the application for grant of mining lease was sought to be reviewed before the Central Government under R 57 of the Minerals concessions Rules and the Central Government rejected the case The High Court on being approached against the order of the State Government under Art. 226 of the constitution of India rejected the petition where against the Supreme Court was approached by way of special Leave Petition contending that the Central Government has merely dismissed the review petition and the effective order rejecting the application for grant of mining lease was that of the State Government and the High Court thus had the jurisdiction to grant a writ The contention was nega and it was held by the Supreme Cour

the High Court was right in taking the view that it had no jurisdiction to issue a writ as the final order was that of the Central Government which was not within its territorial jurisdiction The ratio of the decision is that it was the order of the Central Government dismissing the review petition, which was the final order into which the order of the State Government had merged This case was considered by the Supreme Court in a subsequent case of Shankar Ram Chandra Abhyankar v Krishnaji Dattatraya Bapat AIR 1970 SC 1 So is the position here The order of the Sub-Divisional Officer got merged. In the order of the Commissioner passed in revision notwithstanding the fact whether the Commissioner had affirmed the order of the Sub-Divisional Officer or set aside the same and the position, thus, becomes clear that when the order of the Sub-Divisional Officer gets merged into the order of Commissioner then, under the said notification there is no question of further revision against the same before the State Government

22 Now I come to the second limb of the submission according to which it is to be seen as to what is the meaning of word 'and also' as used in the said notification and whether the same can mean and further' It is clear that the object of the notification is not to provide the remedy one after the other but it is a safeguard, which the State Government, in its wisdom considered appropriate to impose upon the order of the Sub-Divisional Officer, who holds a position much lower in executive heirarchy making it subject to the scrutiny by the Commissioner who holds a much higher position in the executive heirarchy and also by itself so that the elected person may not be treated in light manner or in arbitrary fashion as any curtailment of right is an injury to an elected person as his term practically stands curtailed and he is not in a position to enjoy the same inspite of being the representative of the popular will. If the words and also are interpreted as 'and further' then the order of the Commissioner becomes revisable, but such a meaning would be contrary to the context of the notification which has made only the order of the Sub-Divisional Officer revisable

23 Maxwell on the interpretation of Statute, XII Edition at page 232, on the use of the word and and or' has said —

> "In ordinary usage and is conjunctive and or disjunctive But to carry out the intention of the legislature it may be necessary to read and in place of or' and Vice versa

Further the dictionary meaning of the word also as given in shorter Oxford English Dictionary, III Edition, Vol 1, page 58 and the Webster III new International Dictionary, Vol. II, Page 62 is as likewise

24 Thus if the words 'and also' are interpreted and given meaning 'or likewise', then it harmonizes the context of revisability of the order of the Sub-Divisional Officer Thus the said notification has not provided for two revisions. Only one revision is provided against the order of the Sub-Divisional Officer and the same may be preferred either before the Commissioner or the State Government

25 The third submission as raised is that the order of the Sub-Divisional Officer was void and against such an order no interference was called for under Art 226 of the Constitution of India. In this connection, he has elaborated his argument that when the order was passed, no proceedings under clause (g) of sub-section (1) of S 95 of the Act were pending against the Pradhan and no action was contemplated against him. To appreciate the argument, it is apt to consider the provison of clause (g) and clause (gg), which are as under —

> "95 Inspection —
>
> (1) the State Government may —
>
> (g) remove a member of Nyaya Panchayat or a joint Committee or Bhumi Prabandhak Samiti, an office-bearer of a Gaon Sabha or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he —
>
> (i) absents himself without sufficient cause for more than three consecutive meetings or sittings,

(ii) refuses to act or becomes incapable of acting for any reason whatsoever or if he is accused of or charged for an offence involving moral turpitude

(iii) has abused his position as such or has persistently failed to perform the duties imposed by the Act and rules made thereunder or his continuance as such is not desirable in public interest, or

(iv) being a Sahayak Sarpanch or a Sarpanch of the Nyay Panchayat takes active part in politics or

(v) suffrs from any of the disqualifications mentioned in clauses (a) to (m) of S 5A,

(gg) Suspend a Pradhan or Up-Pradhan or a member of Gaon Panchayat or joint Committee or Bhumi Prabandhak Samiti or a Panch, Sahayak Sarpanch or Sarpanch of Nyay Panchayat against whom proceedings under clause (g) are pending or contemplated or against whom prosecution for an offence, which in the opinion of the State Government involves moral turpitude, is pending

Provided that an order of suspension under this clause shall not affect the right, if any of the Pradhan or the Up-Pradhan, as the case may be to take part in the proceedings o a meeting convened under S 14 and to vote at such meeting "

26. In clause (gg), the language used is "proceedings under clause (g) are pending or contemplated or against whom prosecution for an offence which, in the opinion of the State Government involves moral turpitude, is pending ' The submission is that in the normal sense the word contemplated connotes proposed postulated or anticipated. The word contemplated should have preceded the word pending as the proceeding would become pending only after contemplation and in this connection the learned counsel for the respondent has placed reliance upon R. 49A of the U P Civil Services (Classification Control and Appeals) Rules, 1930 and R. 12 of the Central services (Classification, Control and Appeals) Rules, 1957, wherein the word contemplated is used first and pending is used subsequently and on this basis he submits that the deviation from the normal user of the word has significance Thus, it becomes necessary to find out that as to whether the change of sequence of the user of the word pending or contemplated' in the context of the provisions of clause (gg) will make any difference This deviation of course, makes one to think that the word contemplated is used in a changed sequence must have the meaning other than proposed, postulated or anticipated and wherefor it becomes necessary to analyse clause (g) and clause (gg)

27 Clause (g) provides for three situations for removal of a person

(i) By holding an enquiry after affording an opportunity to the person concerned for finding out the truth about his guilt and thereafter on the basis of the finding of the enquiry to propose action against him.

(ii) When no enquiry for finding out the guilt of the person has to be conducted under clause (g) but only an action for removal of the person has to be taken after the guilt has been settled elsewhere otherwise than in proceedings under clause (g) and

(iii) where no guilt has to be established either under clause (g) or elsewhere and if the person is accused or charged for offences involving moral turpitude can be proceeded straightway for removal. In the back ground of the aforesaid three situations or stages envisaged under clause (g), clause (gg) has to be analysed as the same also provides for three situations for the purpose of suspension. In clause (g) for example take the case of a person who is to be removed on the ground of suffering from any disqualifications mentioned in clause (g) clauses (a) to (m) of S 5A. S 5A provides for disqualification, but S 6A provides that the decision on the question of disqualification of a person by the authority prescribed therefor is made final subject to the appeal. Thus, in this clause, no enquiry for finding out the disqualification of a person has to be made but the straightway action for removal has to be passed. So in all these situations, it is not necessary that the enquiry against a person must be started but without resort to any enquiry the action of removal can straightway be proceeded with and if the straightway action is to be proceeded, then there is no question of any pendency of enquiry into the fact of guilt or contemplation of enquiry for finding out the guilt and in this background it appears the word Contemplated has been used subsequent to the word pending' in clause (gg) and the same obviously has the meaning other than proposed postulated or anticipated. However in the circumstances of the controversy as has been generated in the present case it is worthwhile to take shelter of the dictionary In the New Lexicon Webster Dictionary Deluxe Encyclopaedia Edition, the word contemplated is shown to have the meaning proposed to consider with a view to decision It also supports the contention of the learned counsel for the respondent and also what has been stated above as under clause (g) there are three different stages One Stage is of making for enquiry finding out the guilt of the person than to take decision on the basis of the finding of the guilt The other is no enquiry for finding out the guilt of the person has to be conducted but only the decision regarding his removal has to be taken It makes the user the word contemplated in clause (g) thus, clear that first in such cases as provided under clause (g) which requires the establishment of guilt of a person an enquiry has to be conducted and the other is which requires no establishment of the guilt of a person than only a decision regarding his removal has to be taken And as such the word contemplated' in clause (gg) is not used in the sense of proposed postulated or anticipated

28. Further in view of what has been discussed above under clause (g) a person can be suspended only in case an enquiry into the facts for finding out his guilt has to be made, when such proceedings against him have been pending by some positive act and in such a situation the law has not provided for suspension before start of the proceedings. In the present case, an enquiry against the Pradhan the respondent No 2 to find out his guilt regarding the allegations against him has not been started or set in motion and the decision for removal could be taken only thereafter So it is not a case of any contemplated action against the Pradhan but the suspension of a Pradhan in such a situation is without jurisdiction as no enquiry proceedings under clause (g) were set in motion against him and, thus, the order of his suspension was null and void

29 The fourth submission of the learned counsel for the respondent can be dealt with by coupling the same with the submission of the petitioner In the impugned order the commissioner has made the basis that the Pradhan was not given opportunity before his suspension by the Sub Divisional Officer and, according to the learned counsel for the petitioner under clause (gg) no opportunity for suspending the Pradhan is required by law This argument of the learned counsel for the petitioner has got substance as under clause (ii) of the proviso to sub-section (4) of S 95 of the Act which is as under the words prima facie is used —

(4) Where any Gaon Sabha Gaon Panchayat joint committee or Bhumi Prabandhak Samiti is superseded the State Government may appoint such person or persons to exercise and perform the powers and duties thereof as it may deem fit

Provided that

(i) no action shall be taken under clause (f), clause (g) or clause (h) except after giving to the body of person concerned a reasonable opportunity of showing cause against the action proposed

(ii) no action shall be taken under clause (gg) on the ground that proceedings under clause (g) are pending or contemplated unless the State Government is prima facie satisfied that the grounds on which action is proposed under that clause'

30 If a particular legislation intended to give an opportunity at the stage of suspension then they would have used the word prima facie Therefore for suspending a Pradhan

under clause (gg) no opportunity is required by law However according to the learned counsel for the respondent No 2 the order of the Commissioner is not based on this sole ground The commissioner has also taken into consideration the merits of the matter that the order was not just as there was no material on record regarding the fact that the Sub-Divisional Officer took any action against the Pradhan for the alleged breaches No proceedings under S 122B of the U P Zamindari Abolition and Land reforms Act was initiated It is finding of fact recorded by the Commissioner that that the order of the Sub-Divisional Officer was not just and the same cannot be interfered with even othewise in discretionary jurisdiction under Art 226 of the Constitution of India

31 In the result, the writ petition fails and is dismissed No order as to costs

Petition dismissed

1991 ALL L J 983

= 1991 Cri L J 2964

D P S CHAUHAN, J

Virendra Pratap Singh, Katiyar, Applicant v State of U P and another, Opposite Parties

C M A No 15442 of 1985, D/- 28-1-1991

(A) Prevention of Corruption Act (2 of 1947), Ss 6, 5(2) — Sanction — Accused, a Naib Tahsildar, appointed and also removable from office by the Board — Sanction for prosecution of accused given by Governor — Is invalid — Proceedings against accused — Liable to be quashed

Subordinate Revenue Executive (Naib Tahsildars) Rules (1944), R 36

Where the accused who was prosecuted for the offences punishable under S 5(2) of Prevention of Corruption Act was a Naib Tahsildar who was appointed by the Board of Revenue and was also removable from the office by the Board in view of R 36 of 1944 Rules, the sanction for his prosecution as given by the Governor would be invalid, null and void and the prosecution against accused, would be liable to be quashed It cannot be said in such a case, that the sanction for prosecution accorded by the State Government, which is higher authority than the Board, is valid The words "not removable from his office save by or with the sanction of the State Government are of great relevance The question is not whether the State Government which is higher authority can remove a public servant or not but it is just the other way i e as to whether the public servant is only removable by the State Government or with the sanction of the State Govt and not otherwise It cannot also be said that it is the point of time of granting the sanction which is relevant and not the time when the offences, in fact, committed or alleged to have been committed and that the accused at the time of the commission of the alleged offence of misconduct was holding the post of Naib Tehsildar, but, at the time of granting the sanction, was officiating as Deputy Collector

1984 Cri LJ 613, Foll (Paras 16, 17, 19)

(B) Criminal P C (2 of 1974), S 482 — Inherent powers of High Court — Prosecution of accused under Prevention of Corruption Act without valid sanction — Investigation prolonged against accused for about 8 years and thereafter charges were framed — Entire proceedings not yet completed in spite of order of High Court — Proceedings liable to be quashed — Petition under S 482 cannot be held to be not maintainable on ground that objection as to validity of sanction could be raised before trial Court itself (Paras 21, 22, 23)

Cases Referred Chronological Paras

1984 Cri LJ 613 AIR 1984 SC 684 (Foll) 17

Mr A. N Srivastava, for Applicant, A G A , for Respondents

ORDER — The petitioner, who was a Naib Tehsildar, was posted in the year 1964 in Tehsil Pooranpur District Pilibhit where he continued to remain uptill 1967 In connection with, and in respect of, lease of the land of the Gaon Sabha Seema, the State Government set up a vigilance enquiry against the petitioner as well as against the then Supervisor Kanungo, Tej Bahadur and Lekhpals, Chandra Kumar Dixit and Ram Singh. Sanction for prosecuting the petitioner for offences punishable u/Ss 420/468/120B, IPC and u/S 5(2) of the Prevention of Corruption Act, 1947 (for brevity hereinafter referred to as 'the 1947 Act') was accorded by the Governor on 18-11-1982 The vigilance Cell after a lapse of about eight years submitted a charge-sheet on 21-8-1983 in the Court of Special Judge, Pilibhit, against the petitioner as well as against Tej Bahadur Chandra Kumar Dixit and Ram Singh, for prosecuting them u/Ss 420/468/120B, IPC and u/S 5(2) of the 1947 Act whereupon case was registered as ST No 2 of 1983 (State v Virendra Pratap Singh) and the charges, against the petitioner, were framed on 17-11-1984

2 Out of twenty two witnesses, who were to be examined in the case by the prosecution, nine were the witnesses of fact and rest were of formal nature Out of these nine witnesses, Teja Singh and Swaran Singh died and Chheda Lal, Kallu, Bechan Singh and Balwinder Singh were declared hostile by the prosecution Phool Chand did not support the prosecution case as against the petitioner and the remaining two witnesses Bhagwan Deen and Chandra Bhan on having not been produced were discharged Thus, none of the witnesses of fact supported the case of the prosecution as against the petitioner and according to the petitioner, there exists no evidence or material or document so to incriminate or connect him with the alleged offences

3 In the background of these facts, petitioner invoked the jurisdiction of this Court by means of the present petition u/S 482 of the Code of Criminal Procedure, 1973 (for brevity hereinafter referred to as Cr P C) seeking relief for quashing of the proceedings pending against him in Sessions Trial No 2 of 1983, State v Virendra Pratap Singh, before the Special Judge, Pilibhit This Court, on 5-1-1986, while admitting the petition instead of staying the proceedings in the trial directed for keeping in abeyance the delivery of judgment

4 Heard the learned counsel for the petitioner and the learned Additional Public Prosecutor

5 Learned counsel for the petitioner made following three fold submissions —

(i) that the trial is barred u/S 6 of the 1947 Act as there exists no valid sanction for prosecuting the petitioner for the offences charged with and the proceedings in trial are liable to be quashed

(ii) that on the basis of the charge-sheet submitted by the prosecution and the evidence available on record, no offence against the petitioner is made out,

(iii) that, in the background of the facts and the peculiar circumstances of the case no useful purpose would be served in continuing the proceedings in the trial any further as the same, initiated on the basis of charge-sheet submitted after a lapse of about eight years, have not been completed despite the order of this Court and, in such circumstances, continuation of proceedings in the trial would be abuse of the process of the Court violating the guarantee of speedy trial

6 The submissions as advanced by the petitioner are mainly questions of law and the facts only have peripheral relevance in the course of consideration of the same

7 The State Government, under the Criminal Law (Amendment) Act, 1952 (hereinafter referred to as 'the 1952 Act) was conferred the power for appointing Special Judge, as may be necessary, for such area or areas, as may be specified, for trying the offences punishable u/Ss 161, 162, 163, 164, 165-A, IPC and u/S 5 of the 1947 Act, and any conspiracy to commit or any attempt to commit or any abetment of any of the offences, as mentioned above The special Judge, appointed u/S 6 of the 1952 Act, is

conferred with exclusive powers in respect of the offences mentioned above and also for trying any offences other than the offences mentioned above with which the accused may, under the Cr P C be charged at the same trial Thus, in view of the 1952 Act a charge-sheet against the petitioner was filed in the Court of the Special Judge Pilibhit

8 There is no dispute or doubt regarding the legal position that the trial without a valid sanction, where one is necessary u/S 6 of the 1947 Act, is without jurisdiction Thus, it is to be seen, in the present case, whether the sanction in question was valid one

9 Before considering the submissions, it is apt to have the relevant facts and the rules

10 The petitioner after having been selected by the U P Public Service Commission was appointed as Naib Tehsildar who having completed the period of probation was duly confirmed He was appointed by the Board of Revenue (hereinafter referred to as 'the Board') against a permanent vacancy by direct recruitment and the conditions of service were governed by the rules known as the "The Subordinate Revenue Executive (Naib Tehsildars) Rules, 1944 (hereinafter referred to as the 1944 Rules) Under Rule 36 of 1944 Rules, which is quoted hereunder, the punishment is dealt with

"36 Punishment and appeals — Subject to the modifications noted below, the provisions of the rule regulating punishments and appeals promulgated in the "Punishment and Appeal Rules for the Subordinate Services" shall apply to persons appointed to the Service

(1) The District Officer may censure a Naib Tehsildar

(2) The District Officer may suspend a Naib Tehsildar pending inquiry into any instance of official misconduct or pending the receipt of orders upon any report made as to such misconduct.

(3) Any order for the punishment of a Naib Tehsildar excepting dismissal or removal may be passed by the Commissioner, who shall send a copy thereof to the Board,

(4) Any order for the punishment of a Naib Tehsildar who was not appointed by the Governor may be passed by the Board

(5) The Board may pass any order of punishment except removal or dismissal of a Naib Tehsildar appointed by the Governor

(6) If the Board consider that an order of punishment of removal or dismissal is required in the case of a Naib Tehsildar appointed by the Governor, the Board shall submit the complete proceedings including formal charges, the explanation of the officer and the evidence for and against him together with their own findings and recommendations to Government for orders "

11 The parties are not at variance regarding the status of the petitioner as a public servant and the position, as per rules, is that the petitioner is a person not appointed by the Governor and is removable from the office by the Board

12 Section 6 of the 1947 Act provides for a valid sanction as a precondition for a valid prosecution for the specified offences and the policy underlying in the section and other similar section is that there should not be any unnecessary harassment of the public servant Section 6 of the 1947 Act is as quoted hereunder —

"6 Previous sanction necessary for prosecution

(1) No Court shall take cognizance of an offence punishable under Section 161, or Section 164, or Section 165 of the Indian Penal Code, or under sub-section (2) or sub-section (3-A) of Section 5 of the Act, alleged to have been committed by a public servant except with the previous sanction

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of the Central Government

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government of the State Government,

(c) in the case of any other person of the authority competent to remove him from office

(2) Where for any reason whatsoever any doubt arises whether the previous sanction as required under sub-section (1) should be given by the Central or State Government or any other authority such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed "

13 The learned counsel for the petitioner made two fold submissions regarding the validity of the sanction—

(i) that the sanction accorded by the Governor dated 18-11-1982 is null and void as the authority of the Governor was incompetent to accord sanction as the petitioner was neither appointed by the Governor nor he was removable from the office save by or with the sanction of the State Government, and

(ii) that, in the alternative, the other limb of submission made is that even if the sanction is held as having been validly accorded by the competent authority the same is invalid for the reason of non-consideration of the material before according sanction for the offence of misconduct u/S 5(2) of the 1947 Act and without looking about and making mind regarding the particular misconduct as specified under clause (1), thereof

14 It is clear that the petitioner, appointed by the Board under the 1944 Rules, was removable from the service by the Board In S 6 of the 1947 Act, the relevant words for consideration of the question involved are "not removable from office save by or with the sanction of the Central State Government " The phraseology indicates that the public servant must be a person only removable by the concerned Government or with the sanction of the concerned Government and not otherwise In the present case, it is to be seen whether the petitioner is only removable by the State Government or with the sanction of the State Government so as to attract clause (b) of S 6 of the 1947 Act whereon hinges the question of considering the validity of the sanction accorded for the prosecution of the petitioner

15 The services of the petitioner are regulated by the statutory rules which provide for punishment The word punishment' includes dismissal as well as removal of person from service The petitioner was appointed by the Board and not by the Governor and R 36(4) of the 1944 Rules provides that any order for punishment of a Naib-Tehsildar who was not appointed by the Governor may be passed by the Board He is removable from service by the Board He is not removable by the State Government or with the sanction of the State Government The authority competent to remove the petitioner is the Board Thus, the provisions of clause (b) of S 6 of the 1947 Act would not be attracted in this case but it would be covered under clause (c) which provides sanction by the authority competent to remove the person from the office

16 The objection of the learned Additional Public Prosecutor that the sanction for prosecution accorded by the State Government, which is higher authority than the Board, is valid, has no substance The words "not removable from his office save by or with the sanction of the State Government are of great relevance The question is not whether the State Government which is higher authority can remove a public servant or not but it is just the other way, i e as to whether the public servant is only removable by the State Government or with the sanction of the State Government and not otherwise In the present case, the petitioner is removable otherwise than by the State Government or with the sanction of the State Government

17 The other submission of the learned Additional Public Prosecutor is that it is the point of time of granting the sanction which is relevant and not the time when the offences, in fact, committed or alleged to have been committed The petitioner at the time of the commission of the alleged offence or misconduct, was holding the post of Naib Tehsildar, but, at the time of granting the sanction, was officiating as Deputy Collector This argument is also liable to fail Firstly, there is no foundation of fact in the counter affidavit and, secondly, the proposition remains no more res integra in view of the decisions of the Supreme Court in the case of R S Nayak v A R Antulay, AIR 1984 SC 684 (1984 Cri LJ 613) where the Supreme Court, in paragraph 23, held —

"The expression "Office" in the three subclauses of S 6 would clearly denote that the office which the public servant mis-used or abused for corrupt motive for which he is to be prosecuted and in respect of which a sanction to prosecute him is necessary by the competent authority entitling to remove him from that office which he has abused This inter-relation between the office and its abuse if severed would render S 6 devoid of any meaning and this inter relation clearly provides a clue to the understanding of the provision of S 6 providing for sanction by a competent authority, which would be able to judge the action of the public servant before removing the Bar, by granting sanction to taking of cognizance of the offence by the Court against the public servant Therefore it unquestionably follows that the sanction to prosecute can be given by the authority competent to remove the public servant from the office which he has mis-used or abused because that authority alone would be able to know whether there has been a mis-use or abuse of the office by the public servant and not some rank outsider "

18 In para 26 of the said decision, the Supreme Court has taken the following view —

"Therefore, upon a true construction of S 6 it is implicit therein that the sanction of that competent authority alone would be necessary which is competent to remove the public servant from the office which he is alleged to have mis-used for corrupt motive or for which a prosecution is to be launched against him "

19 For the reasons, as stated above, the sanction in question for the prosecution of the petitioner, not having been given by the competent authority, i e the Board, is invalid and null and void, and, as a consequence whereof, the entire proceedings launched before the Special Judge, Pilibhit and pending before him, are without jurisdiction and liable to be quashed so far as the same relate to the petitioner

20 In view of the finding regarding the invalidity of the sanction, there is no point in dilating the other submissions of the petitioner There is no material before this court as to whether the trial was concluded or not and as to whether, as directed by this Court the judgment is lying in abeyance for pronouncement

21 Learned Additional Public Prosecutor, at the last, only raised the objection as to the maintainability of the petition on the ground that the objection regarding the validity of the sanction could be raised by the petitioner before the Special Judge itself and this Court, as such, should refrain to interfere This objection is devoid of merit and is stated only for being rejected The amplitude of power U/s 482 Cr P C is wide enough The statute itself prohibits in so many words that no court shall take cognizance of the offence without a sanction, which means a valid sanction, then it is always open for this court to rectify the error at the root as otherwise it will lead to injustice In a set up governed by rule of law no interest is higher than the interest of justice

22 Apart from this, the facts of this case also require interference by this Court so as to stop unnecessary harassment of the petitioner as investigation was prolonged against him for about 8 years and thereafter the charges were framed against him on 5-1-1986 The entire proceedings, in spite of the order of this Court, have not yet been completed, as per the statement made at the Bar

23 Accordingly, in view of what has been

stated above, I allow the petition and quash the proceedings in sessions trial No 2 of 1983 State v Virendra Pratap Singh and others, pending in the court of the Special Judge, Pilibhit as against the petitioner There will be no order as to costs

Petition allowed

1991 ALL L J 988

= 1991 Cri L J 2969

N L GANGULY, J

Shri Shailendra Kumar Jain and others, Petitioners v State of Uttar Pradesh and others, Respondents

Cri Misc Appln No 3736 of 1991 D/- 16-4-1991

Criminal P C (2 of 1974), S 210 — Joint trial — Offence regarding refusal to give sample to Food Inspector — Accused committing mischief and also preventing the Food Inspector from discharging his legal official duties — Both are separate offences — Joint trial, not permissible

Prevention of Food Adulteration Act (37 of 1954), S 16(1)(c)

Penal Code (45 of 1860), Ss 332, 352, 427 (Para 2)

Mr V S Singh, for the Petitioners S C, for the Respondents

ORDER — This is an application under S 482, Cr P C seeking an order that the proceedings in complaint case No 9 of 1991 State v Gopal Das and others under S 16(1)(c) of the Prevention of Food Adulteration Act, P S Kotwali Jhansi, pending in the court of Munsif Magistrate (Economic Offences), Jhansi may remain stayed by virtue of provision of S 210(1), Cr P C It is stated that an FIR has been lodged in respect of the same incident u/Ss 332, 352 and 427 IPC by the Chief Food Inspector, Jhansi It is stated that the incident took place at the same time One offence is an offence punishable under the provisions of the I P C causing hinderance in discharge of the official duty of the Government servant hurt and mischief, while other case is u/S 16(1)(c) of the Prevention of Food Adulteration Act The two sets of offences are entirely different and distinct and there is no prohibition in law that proceedings in both the cases cannot be proceeded simultaneously The provision of S 210, Cr P C are not attracted in such circumstances The learned Counsel has not correctly appreciated the provision of S 210, Cr P C The purpose of S 210, Cr P C is that there may not be two conflicting contradictory results in a case This is a procedure provided to be followed when there is a complaint case and police investigation in respect of the same offence The provision of S 210, Cr P C are quoted as under —

210 Procedure to be followed when there is a complaint case and police investigation in respect of the same offence — (1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is subject-matter of the inquiry or trial held by him the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation

(2) If a report is made by the investigating police officer u/S 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code "

2 The cases u/S 16(1)(c) of Food Adul-

teration Act and Ss 332, 352 and 427 of I P C are distinct and separate It may be that in one and same transaction when the Food Inspector and his party reached the petitioners' shop for enquiry and taking sample of certain item of food material, the accused applicant committed offence by refusing to give sample of the item of food The offence u/S 16(1)(c) of the Prevention of Food Adulteration Act was committed In case in the course of commission of offence under S 16(1)(c) of Food Adulteration Act the accused assaults the Food Inspector and his party men, commits mischief and also prevents the public servant to discharge his legal official duties, the offence u/Ss 332, 352 and 427 Indian Penal Code are also committed Since both the offences are distinct and separate, under provisions of different Acts, they are to be tried separately The other submission is to amalgamate both the proceedings and to direct that both the cases may proceed together There is no such provision for amalgamating two criminal proceedings in the Code The submission is misconceived and cannot be allowed Next arguments is that if both the cases are not allowed to proceed simultaneously, it would result in double jeopardy This submission is also misconceived As already observed both offences are distinct and separate under different Acts, the accused are liable to be tried for both the offences separately There is no question of double jeopardy I do not find any merit in the submissions made by learned counsel for the applicants The application u/S 482, Cr P C is accordingly dismissed summarily

Application dismissed

1991 ALL L J 989

= 1991 Cri L J 2976

H C MITAL AND K NARAYAN, JJ

Ramesh and others, Appellants v State of U P , Respondent

Cri Appeal No 10 of 1979, D/-19-1-1991 *

-Penal Code (1860), S 300 — Murder — Appreciation of evidence — Witnesses highly interested persons and not having houses near scene of occurrence — Other persons who were present not examined — Prosecution not coming with clean hands — Origin of incident shrouded by mystery in view of unexplained injuries on accused — Evidence on record not sufficient to prove offence beyond reasonable doubt — Accused entitled to acquittal

Evidence Act (1872), S 3 (Paras 17, 18)

Mr G S Chaturvedi, Mr R P Singh and Mr Keshav Sahai, for Appellants, D G A , Mr S N Mulla, Mr A N Mulla, for State

H C MITAL, J — Ramesh Ram Gopal and Ravi Shanker have preferred this appeal against the judgment dated 23-12-1978 passed by Sri B B S Chaudhary, the then Xth Additional Sessions Judge, Kanpur Dehat, convicting appellant Ramesh u/S 302, IPC simpliciter and the remaining two Ram Gopal and Ravi Shanker u/S 302 read with S 34, IPC and sentencing all the three appellants to life imprisonment

2 The facts of the case, in brief, are that there was a water channel, going through the fields of appellant Ravi Shanker and Ramesh Ramesh is son of Ram Gopal They closed the water channel The deceased Sardar Singh along with Kali Charan and Siduhoo Singh were digging it in the evening prior to the

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*Against the judgment and order passed by Sri B B S Chaudhary, 10th Addl S J , Kanpur, D/-23-12-1978

DI/HI/A438/91/RAM/VNP

occurrence The appellant Ramesh and Ravi Shanker reached there and intervened and got it stopped and left saying that they would teach them a lesson On 21st October, 1976 at about 8-30 a m the deceased Sardar Singh and Raja Singh were called at the Chabutra of Bhagwan Lodh by Ram Gopal to get the dispute settled While Ram Gopal and the two deceased Sardar Singh and Raja Singh were talking, appellants Ramesh armed with the gun of his father Ram Gopal, Ravi Shanker armed with a Tabal and Raja Ram armed with a pharsa reached there and threatened that if any one would again dig the water drain, they would kill him Thereupon a wrangle ensued between the accused-appellants Ramesh and Ravi Shanker on one hand and the deceased Raja Singh and Sardar Singh on the other At that moment Ramesh fired a shot with his gun at Raja Singh and Ravi Shanker and Raja Ram attacked Sardar Singh with the Tabal and Pharsa and thereafter the accused made good their escape Both the injured died on the spot An FIR of the occurrence was lodged at police station Gajner at a distance of five miles by P W 1 Nawab Singh narrating the above incident In the FIR in column No 2 regarding the names of the accused the name of appellant Ram Gopal was not entered

3 The investigation of the case was entrusted to P W 8 S I Ranvir Singh Solanki, who reached the scene of occurrence, prepared the inquest report of the dead bodies and then sent them for post mortem examination and after completion of the investigation submitted the charge sheet against Ramesh, Ram Gopal, Ravi Shanker and Raja Ram u/S 302/34, IPC

4 At the trial the prosecution examined 8 witnesses of whom P W 1 Nawab Singh, P W 2 Badlu Singh, P W 3 Bharat Singh and P W 7 Ram Gulam are the eye witnesses of the occurrence and they corroborated the prosecution story stated above P W 4 Shripal Singh was Head Moharrir at the relevant time He proved the first information report and registered the case in general diary and made other relevant entries P W 5 Dr G C Gupta had done the autopsy on the two dead bodies on 22nd October, 1976 from 1-30 p m to 4 p m The deceased had received the following injuries —

Ante mortem injuries of Sardar Singh vide post mortem report Ext Ka-6

1 Incised wound 4½" x 1" bone deep on the right side of the neck behind the right ear obliquely cutting the angle of the mandible bone caroted vessels on the right side and the body of the 5th vertebra on the right side margins clean cut and everted

2 Incised wound 2" x 1/10" x whole thickness of the right penna of the ear cutting the lower part completely clean cut edges

3 Incised wound 3½" x 1/2" bone deep on the back of the chest upper part obliquely near and middle line, cutting the third and fourth ribs on the right side disternly

5 On internal examination there was clean cut on the 5th cervical vertebra, 4th and 5th ribs on the right side and right angle of the mandible cutting the caroted artery Stomach contained 12 Oz of Semi digested food Small intestines were full of faecal matter and gases

Ante mortem injuries of Raja Singh, vide postmortem report Ext Ka-7

1 Gun shot injury 4" x 2" x cranial cavity deep on the front of the fore-head Rt side from Rt eye to the forehead upper Rt side Edges inverted, blackening and charring present Direction back-wards to the right Brain matter peeping out from the wound

6 On internal examination there was a fracture of the frontal parietal, temporal and occipetal bones on the right side Membrane and brain were badly lacerated Two pellets were recovered from the brain Stomach contained 8Oz fluid material Small intestines were full of faecal matter and gases

7 P W 6 S I Ram Swarup Singh is a formal witness and he had executed the warrants regarding attachment of the property etc when the accused Raja Ram and Ravi Shanker were absconding P W 8 S I

Ranvir Singh Solanki deposed about the various steps taken by him during the course of investigation

8 On the other hand, the defence version of the accused Ramesh has been that two days prior to the occurrence Nawab Singh and Sardar Singh were digging drain in his field of paddy On finding that his crop was being damaged, he stopped them and then both of them had left On the date of incident at about 9 a.m. when he again went to see his crop he found that Raja Singh and Sardar Singh were digging the drain On his remonstration why they were again digging the drain, Raja Singh attacked him with a Lathi That he himself was empty handed Gun of Sardar Singh was lying there Raja Ram then exhorted Sardar Singh to shoot him to finish the dispute for ever and when Sardar Singh attempted to shoot him he caught his gun and struggled and during that struggle the gun got fired That he himself had received several lathi injuries and had fallen down unconscious He subsequently found himself at his house After some time his father arrived there from Kanpur with his gun and sometimes thereafter the Investigating Officer arrived there and arrested him and carried his father's gun to the Police Station In defence, he examined D W 1 Harbilas Tewari, Block Organiser who deposed that in his presence the quarrel had taken place on 10-9-76 when he had gone to get the drain dug up At that time Nawab Singh objected and then a quarrel took place between Ravi Shanker and Nawab Singh, hence he stopped the work Subsequently he again went on 14-9-76 with the police force and got the drain dug

9 D W 2 Jai Narain stated that Ram Gopal was living in Kanpur for the last 10-12 years, that he used to keep his gun at Kanpur; that there was a separate drain through which the field of Raja Singh was irrigated, that on that day at about 10 a m when he was putting his cart in order he came to know that Ramesh had been injured and that he was lying in his paddy field near the drain He then went there and carried him to his house

10 Lastly, D W 3 Dr Kishan Lal Shah was the Medical Officer in the District Jail, Kanpur He had examined Ramesh in the District Jail on 22-10-76 at 9-40 p m and noted the following injuries on his person vide injury report Ext Kha-7 —

Injuries of Ramesh vide Ext Ka-7

1 Contusion 3 cm x 2 cm on left ear pinna of upper part

2 Abraded contusion on the back of right ear in an area of 1 cm x 1/2 cm.

3 Abraded contusion 6 cm x 1 cm on front lateral side of right side neck of its base

4 Contusion 6 cm x 1 5 cm on the left side neck middle 1/3 region

5 Contusion multiple 12 cm x 3 cm on front medial aspect of right upper arm

6 Contusion 3 cm x 1 5 cm in front of right eblow

7 Contusion 2 5 cm x 1 5 cm on medial aspect of right elbow

8 Abraded contusions 3 cm x 1 cm on the back of right hand on the base of middle and index finger

9 Abrasions 1/2 cm x 1/2 cm at dorsal side of right index finger

10 Traumatic swelling at right dorsem of hand (u o)

11 Traumatic swelling at whole of left dorsum of hand

12 Contusions 3 cm x 1 5 cm on the dorsum of left hand

13 Contusions 4 cm x 1 5 cm on the dorsum of left hand

14 Contusion 2 cm x 1 cm on posterior side of left thigh middle 1/3

15 Complain of pain in whole of chest (u o)

11 In his opinion all the injuries could be caused on 21-10-1976 at about 10 in the morning He proved the injury report Ext Kha-7

12 The learned Sessions Judge believed the prosecution case and disbelieved the defence version and hence convicted and sentenced all the three appellants as stated above Raja Ram died during the trial On being aggrieved this appeal has been preferred and on behalf of the appellants the learned counsel argued that the prosecution case was highly suspicious, that Ramesh received 14 injuries at the scene of occurrence which have not been explained by the prosecution and that from the totality of the circumstances it is clear that the prosecution has failed to bring home guilt to the appellants beyond reasonable doubt

13 The main question for decision is, whether the injuries received by Ramesh have been duly explained by the prosecution The prosecution has tried to explain the injuries of Ramesh alleging that the same were received at the time of his arrest when he had put up resistance The prosecution however, did not file a copy of the entry of his injuries in the G D On the other hand, the defence got the same proved through P W 4 S I Shripal Singh who was Head Moharrir on 21st Oct 1976 at police station Gajner and in his cross-examination he admitted that Ramesh was brought to the police station under arrest by the Station Officer Ram Swarup Singh Bhadoriya on 21-10-76 at 7-30 p m and a case u/S 25 of the Arms Act was registered against him At that time his injuries were also noted and he proved Ext Kha-1, copy of the entry in the G D The injuries mentioned are "Chot dono Hathon me, Panjo me, Chot Kharas" i e only abrasions were noted on both the hands and feet of Ramesh However, by Dr Kishan Lal Shah D W 3 of the District Jail Kanpur on the following day i e , on 22nd October, 1976 as many as 14 injuries were noted on his person as described in the injury report Ext Ka-7 Besides the injuries on the hands and feet, injuries on both ears and both sides of neck as well as elbow and thigh were also noted There is no explanation to those injuries That apart, though the injuries on hands were there but no injury on the feet of Ramesh was noted by the Doctor except injury No 14 on the posterior side of left thigh middle 1/3, which cannot be said to be on the feet According to Dr K L Shah D W 3, those injuries appeared to have been caused on 21st October, 1976 at about 10 in the morning, i e they could be received at the time of the occurrence and were consistent with the defence version The number and nature of the injuries clearly belies the prosecution case that the same were caused to the accused-appellant Ramesh when he put up resistance at the time of his arrest The injuries on ears as well as both the sides of the neck clearly indicate that he had been badly assaulted with lathis

14 That apart, on behalf of the appellant a certified copy of the judgment in the case u/S 25 of the Arms Act, which was registered against him after his arrest along with the gun, has been shown to us and the same was not disputed that he was acquitted by the Judicial Magistrate on 10-8-83 and in the judgment the arrest of Ramesh along with gun at that time was disbelieved Admittedly no Govt Appeal has been preferred That further belies the prosecution case that Ramesh was arrested along with the gun as alleged by the prosecution and that further belies the prosecution explanation to the injuries received by Ramesh at the time of his arrest at that moment

15 That apart, no role was assigned to Ram Gopal in the FIR nor in the evidence It is also not alleged that he had exhorted either of the accused-appellants to attack any one on the complainant's side In spite of that surprisingly not only charge sheet was submitted against him but he had also been convicted by the learned Sessions Judge simply because he was present at that time and hence it was presumed that he must have also exhorted Ramesh, Ravi Shanker and Raja Ram to kill the deceased It is also of importance to mention that in the end of his statement P W 1 Nawab Singh admitted that on the date of occurrence Ram Gopal was at his own house at about 2 p m Had Ram Gopal participated in the occurrence as alleged along with others, he could not be present at

his residence and not arrested from there This part of his statement corroborates the statement of Ramesh appellant u S 313, Cr P C that in the afternoon the Investigating Officer had come and before that his father had come from Kanpur with his gun and the Investigating Officer had then arrested him (Ramesh) and had also taken the gun of his father with him while his father was not apprehended at that time

16 According to P W 1 Nawab Singh Mangi Lal had taken him from his house at about 8 a m and then along with him Sardar Singh and Raja Singh he had gone to the Chabutra of Bhagwan Lodh where the incident had taken place The prosecution neither examined Mangi Lal nor Bhagwan Lodh at whose Chabutra the incident had taken place nor Rameshwar whose house is opposite in the east to the scene of occurrence or any other person of the locality Instead, all the eye-witnesses are highly interested persons Nawab Singh P W 1 is brother of both the deceased Raja Singh and Sardar Singh P W 2 Badlu has admitted in his cross-examination that he was Zamindar of Tilochi Village that Smt Siddhi Kunwar was his tenant that Smt Ganga Dei daughter of Siddhi Kunwar was married to Ram Gopal father of appellant Ramesh that he had filed a suit for eviction against Smt Siddhi Kunwar and that he had lost both in the revenue court as well as Commissioner s court That apart P W 1 Nawab Singh has admitted that the house of Badlu Singh is at a distance of one furlong from the scene of occurrence Thus this witness was not only an interested one but there was no reason of his presence at that place P W 3 Bharat Singh though stated that he was at his house which was 15-16 paces away from the scene of occurrence but in his cross-examination he admitted that he was a Truck Driver and lives in Govindnagar He also admitted that he was resident of village Lakshman Pur which is at a distance of 18 miles It was alleged that his name was struck off from the voters' list as he was not resident of that village and against it he had preferred an appeal before the Sub Divisional Magistrate which was also dismissed He also avoided to answer that his mother had taken loan of Rs 3000 - from Ram Gopal accused and that for Rs 500 - a gold Mohar was pawned with Ramesh but admitted that he did not take back his gold Mohar as he had to pay Rs 900 - and thus he lost his gold Mohar P W 7 the other eye witness Ram Gulam has his house at a distance of three furlongs from the scene of occurrence as this fact has been admitted by P W 1 Nawab Singh in his cross-examination himself Thus he had no obvious reason to be present at the scene of occurrence He however admitted that in the court of Tehsildar there was a case against him u S 122 of the U P Zamindari Abolition and Land Reforms Act in which he was fined to Rs 1000 - and that case was got prosecuted by appellant Ravi Shanker and his father Vijai Bahadur, who was Sasha Pati of the Panchayat Thus all the witnesses examined in the case were highly interested persons and not having houses near the scene of occurrence when admittedly other persons who were present were not examined

17 The above circumstances clearly indicate that the prosecution has not come with clean hands and had also failed to establish the origin of the incident as alleged The origin of the incident appears to be shrouded in mystery in view of the unexplained number of injuries of Ramesh accused-appellant The conclusion, therefore is that the evidence on record is not sufficient to bring home the guilt to the appellants beyond reasonable doubt

18 The appeal is therefore, allowed The conviction and sentence of the appellants u S 302 read with S 34 IPC are hereby set aside They are on bail They need not surrender and their bail bonds are cancelled and sureties discharged

Appeal allowed

1991 ALL L J 994

= 1991 Cri L J 3010

N L GANGULY, J

Rajiv Kumar Applicant v State of U P, Opposite Party

C M A No 3463 of 1991 D/- 7-3-1991

Negotiable Instruments Act (1881), Ss 138, 142 (as inserted by Act 66 of 1988) — Dishonour of cheque — Criminal Liability — Service of notice of demand and failure to pay in spite of notice are conditions precedent for fastening liability on drawer — In absence of notice no cognizance can be taken under S 142

Dishonour of cheque — Criminal liability when arises

As regards liability for dishonour of cheque under S 138 of the Act it is necessary to prima facie show that even after 15 days of receipt of the notice as contemplated u/s 138(b) of the Act, the accused failed to pay the amount In order to fasten a criminal liability on a person, the requirement of law has to be fully complied with Therefore, where the notice of demand as required u/s 138(b) of the Act was not served at all in absence of service of notice no prosecution and cognizance of offence was permissible (Paras 6, 7)

Mr D K Dewan, for Applicant

ORDER — This petition under Sec 482 Cr P C has been filed against the order passed by the Magistrate affirmed by the learned Sessions Judge in revision refusing to summon the accused person in a case under Sec 420 I P C read with S 138 of Negotiable Instruments Act, as amended by Amendment Act No 66 of 1988

2 The dispute arises out of a business transaction A post-dated cheque for 25-11-89 was issued by the accused/opp-party on 15th October, 1989 which was to be presented before the Bank on 25th November 1989 The said cheque was presented for encashment on 19-2-90 before the Bank It was returned by the Bank with letter dated 27-2-90 with slip 'refer to drawer' as there was insufficient amount in the account of the accused/opp party The cheque was dishonoured and not encashed Being aggrieved by such dishonouring of the cheque the criminal complaint aforementioned was filed The complainant before filing the Criminal Complaint sent a notice dated 8-3-90 through his Counsel Sri Maheshwari, Advocate for making payment of the amount of cheque

3 The present petition under Sec 482, Cr P C is thus filed by the complainant The specific finding about the nature of case as of a civil nature is supported by the admitted fact stated in the complaint that there had been business transaction between the parties Further the fact that the post-dated cheque in question was dated 25-11-89 issued on 15-10-89 The cheque was not presented on 25-11-89 or on a near date It was presented on 19-2-90, when it was found that full amount was not there in the account of accused Since the cheque was presented after about 7 weeks of the due date for encashment of cheque, it cannot be conclusively said that on 25-11-89 or near about dates there was no money in the bank account Further it also cannot be assumed that on the date of issuing of the cheque there was no intention of accused to pay at all In view of the admitted fact of having business transactions between the parties the learned Sessions Judge was correct in saying that it was a case of civil nature and no offence under Sec 420, I P C was made out against the accused/opp-party

4 The other argument which has been addressed by the counsel for the petitioner is that the case under Sec 138 of the Negotiable Instruments Act, was fully made out and the Courts below have not considered the said aspect of the matter and illegally refused to summon the accused for the said offence The provisions of Sec 138 of the Negotiable Instruments Act 1881 are produced as under to appreciate the argument

'138 Dishonour of cheque for insufficiency etc of funds in the account — Where any cheque drawn by a person on account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge in whole or in part of any debt or other liability is returned by the Bank unpaid either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that Bank such person shall be deemed to have committed an offence and shall without prejudice to any other person of this Act be punished with imprisonment for a term which may extend to one year or with fine which may extend to twice the amount of the cheque or with both

Provided that nothing contained in this section shall apply unless —

(a) the cheque has been presented to the Bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier

(b) the payee or the holder in due course of the cheque as the case may be makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be to the holder in due course of the cheque, within fifteen days of the receipt of the said notice

5 There is one provision about the taking of the cognizance of offences under the said Act provided in Sec 142 Provision of Sec 142 of the said Act is quoted as under

142 Cognizance of offences' (1) Notwithstanding anything contained in the Code of Criminal Procedure 1973 (2 of 1974) —

(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint in writing made by the payee or as the case may be the holder in due course of the cheque

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the Proviso to section 138

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Sec 138

6 On analysis of the aforesaid two sections for making out a case u s 138 of the Negotiable Instruments Act the ingredients are (1) the payee of the cheque in case of non-payment of the cheque is required to send notice within fifteen days in writing to the drawer of the cheque from the date of receipt of information about non payment demanding the amount of cheque (ii) the drawer fails to make payment of the amount within fifteen days from the date of receipts of the notice there would be a case u s 138 of Negotiable Instruments Act provided the action is taken for cognizance of the offence as provided u s 142 of the said Act

7 In the present case information about non-payment of the cheque was received by the applicant on 27-2-90 It is said that a notice to the accused was sent by registered post on 8-3-90 There is no evidence or acknowledgment receipt of the post office that the notice dated 8-3-90 was ever served personally on the accused opp-party Thus, it was necessary to prima facie show that even after 15 days of receipt of the notice as contemplated u s 138 (b) of the Act the accused opp-party failed to pay the amount In order to fasten a criminal liability on a person the requirement of law has to be fully complied with In the present case it has not been shown that notice of demand as required u s 138(b) of the Act was served on the opposite party The postal acknowledgement Annexure 2-E shows that it was delivered to one Guddu not to the opposite party The said acknowledgment do not show that it was addressed in the name of accused opp-party In absence of service of notice u s 138(b) of Act no prosecution and cognizance of offence is permitted

8 The petitioner has filed a true copy of the complaint dated 22-3-90 which was dismissed by the learned Chief Judicial Magistrate on 8-6-90 The petitioner after dismissal of the complaint on 8-6-90 again filed fresh complaint on 13-6-90 before the Judicial Magistrate which too was dismissed u/s 203 Cr PC on 23-7-90 The petitioner appears to have filed the revision before Sessions Judge against the order dated 8-6-90 without disclosing that fresh complaint filed on 13-6-90 was also dismissed u/s 203 Cr P C on 23-7-90 The petitioner nowhere in the affidavit disclosed that original complaint dated 22-3-90 was dismissed on 8-6-90 and second complaint case was filed on 13-6-90 which was also dismissed on 23-7-90 The proceedings u/s 482 Cr P C are akin to the proceedings under Art 226 of the Constitution The petitioner in case files a petition u/s 482, it is expected that true and correct facts have been stated in the affidavit Any attempt to conceal material facts which may mislead the court is always fatal for such petitions The perusal of the judgement of the learned Sessions Judge shows that the complaint case was dismissed on 8-6-90 by the Chief Judicial Magistrate The complainant applicant again filed a fresh complaint on 13-6-90 which too was dismissed on 23-7-90 by the learned Judicial Magistrate I The revision was filed by the petitioner against the judgment dated 8-6-90 passed by the Chief Judicial Magistrate No revision against the dismissal of the complaint case u/s 203 Cr P C on 23-7-90 appears to have been filed Thus, the said order dated 23-7-90 passed by the Judicial Magistrate, I, became final The petitioner came to the High Court by concealing material facts In such circumstances no extraordinary powers are to be invoked by this Court

9 In absence of any proof that the notice u/s 138(c) of the Act was served on the accused opposite party there was no justification in prosecuting the accused/opposite party for offence u/s 138(c) of the Negotiable Instruments Act Since the petitioner admitted having business relations with opposite party and provisions of Sec 138(c) of the Act are not complied with and the order dated 23-7-90 dismissing the second complaint also u/s 203 Cr P C which became final I do not find any circumstance to interfere under Sec 2 Cr P C

10 The petition is dismissed

Petition dismissed

1991 ALL L J 996

= 1991 Cri L J 3015

S R BHARGAVA, J

Preetpal Singh, Applicant v Smt Ishwari Devi and others, Opposite Parties

Criminal Revision No 401 of 1989, D/- 6-5-1991 *

(A) Criminal P C (2 of 1974), Ss 125, **397(3) — Revision — Maintenance granted to wife and minor son — Revision by Husband — Dismissal of — Second revision by husband through his minor son — Not maintainable**

Where revision filed by the husband against order of maintenance granted to wife and minor son living with her was dismissed and the husband sought to file a second revision through his minor son for alteration of maintenance, the revision would not be maintainable as both the Magistrate and Revisional Court did not pass any order against the minor for which he could have been aggrieved (Para 5)

(B) Criminal P C (2 of 1974), Ss 125,127 **— Maintenance — Granted to wife and minor son in her custody — Father taking away son from custody of mother without adhering to proper procedure — Application by father u/S 127 for alteration of maintenance on ground of change of custody of son — Not maintainable**

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*Against the judgment and order passed by Shri R P Pandey Special Addl Sessions Judge, Muzaffarnagar, D/- 24-1-1989

Hindu Minority and Guardianship Act (32 of 1956), S 6

Guardians and Wards Act (8 of 1890), S 25

Maintenance — Alteration on ground of change in custody — Permissibility

When an application u/S 127 is made for altering or annulling an order Magistrate can make elaborate inquiry and then only an appropriate order for annulment or alteration can be passed U S 6 of the Hindu Minority and Guardianship Act, father is a natural guardian for his minor son But once minor is in custody of the mother the father cannot take away the minor from guardianship of the mother except by proper application u/S 25 of the Guardians and Wards Act Since the custody of the minor with his mother in the instant case had not been changed according to law the application by the father u/S 127 for alteration of maintenance granted to his wife and minor son on ground that the minor son was living with him would not be maintainable (Para 6)

Sri V S Chaudhary for the Petitioner A G A Sri D R Chaudhary, Sri Onkar Singh for the Respondents

ORDER — This Criminal Revision has come up in peculiar circumstances

2 Opposite party No 2 Mahendra Singh and opposite party No 1 Smt Ishwari Devi are husband and wife They are blessed with sons Yashpal and revisionist Preet Pal Singh Wife Smt Ishwari Devi filed an application u/S 125 Cr P C against her husband claiming maintenance for herself and her minor sons She attributed unfaithfulness to her husband who has illicit relation with one Smt Kaushal She further alleged that despite means that is a salary income of Rs 2,500/- per month and annual income from 50 bighas of land, her husband has been neglecting her and her children Husband resisted the application and denied the allegations of the wife He alleged that the wife is employed and is getting Rs 1000/- per month But there was break in service He denied that the children lived with her He pointed out that in divorce petition he is paying Rs 300 - per month to the wife

3 Learned Magistrate held that husband has sufficient means namely basic pay of Rs 2 500 - and income from 50 bighas of land that the wife has been unable to maintain herself from January 1987 that the husband has been cruel with wife and has been making false allegations against her character that the husband has kept another woman that the wife has sufficient cause for separate living that one of the sons is living with the husband whom the husband is maintaining himself but the other son is with the wife With these findings Magistrate awarded maintenance of Rs 500 - per month to the wife and Rs 500 - to the son living with the wife till he attains majority

4 Against this husband filed revision During the pendency of the revision he filed an application that the son has come to him and so the wife cannot get maintenance for him Learned Lower Revisional Court confirmed the findings of the Magistrate The son appeared before Revisional Court and said that for the last 3-4 months he has been with his father The Lower Revisional Court held that the father was not given custody of the minor by any court It observed that since the minor came to the father he has not been receiving education Father brought the son only to defeat the order of the Magistrate with these findings the learned Revisional Court dismissed the revision Then the present revision was filed in the name of the minor Preet Pal Singh through his uncle Braham Singh In this revision, it was reiterated that the minor has been living with his father In the revision orders of the Magistrate as well as the Lower Revisional Court were challenged

5 I have heard the parties counsel and has already observed it is a peculiar second revision brought by an ingenious device Father lost his first revision and then he himself could not file the second revision u/S 397(3), Cr P C Hence this ingenious device was sought I am afraid that the

ingenious device cannot be permitted Both the Magistrate and the lower revisional court did not pass any order against the revisionist from which revisionist could have been aggrieved Whatever orders the Magistrate and the Lower Revisional Court passed were against the father I hold that the son having no order against him cannot maintain revision

6 Secondly once an order for maintenance is passed in favour of a minor, on change of circumstances that order can be annulled or altered only u/S 127 Cr P C When an application u/S 127 Cr P C is made for altering or annulling an order Magistrate can make elaborate inquiry and then only an appropriate order for annulment or alteration can be passed It is no doubt true that u/S 6 of the Hindu Minority and Guardianship Act, father is a natural guardian for his minor son But once minor is in custody of the mother the father cannot take away the minor from the guardianship of the mother except by proper application u/S 25 of the Guardians and Wards Act It should not be forgotten that in granting custody the court exercising parental jurisdiction has to look after the welfare of the minor It is only in proper proceedings u/S 25 of the Guardians and Wards Act that welfare of the minor can be determined I hold that since the custody of the minor had not been changed according to law, no relief could be given to the father

7 In result this revision has no force and is hereby dismissed

Revision dismissed

1991 ALL L J 998

= 1991 Cri L J 3016

G MALAVIYA J

Sundar Singh Applicant v State of U P and another Opposite Parties

C M A No 7017 of 1991, D/-30-5-1991

Criminal P C (2 of 1974), S 451 — Release of truck, a case property — Only on application of owner of vehicle

When the owner of the vehicle makes an application for its release then only the question of release of the truck which was a case property could be considered The court dealing with the matter should direct release of the case property, provided it is not involved in a very serious type of offence and if the person makes an application to the court with an undertaking to produce before the court again in the same condition in which it was at the time of the commission of the crime (Para 2)

Mr S P Sharma, for Applicant A G A, for Opposite Parties

ORDER — Heard the learned counsel for the applicant A perusal of the order dated 16-5-1991 passed by the Ist Additional Munsif-Magistrate Kasia district Deoria in Crime Number 112 of 1991 u/S 5A/8 of the U P Prevention of Cows Slaughter Act read with S 11 of the U P Prevention of Cruelty of Animals Act police station Hata, district Deoria reveals that the Driver of Truck number U R M 8116 had made an application for release of the said Truck The application was however, dismissed on the ground that the Truck was a case property

2 The application even otherwise could not have been allowed as no vehicle can be released in favour of its Driver Only when the owner of the vehicle makes an application for its release, the question of release of the Truck could be considered However it may be observed that in these type of cases it is always desirable that the court dealing with the matter should direct release of the case property, provided it is not involved in a very serious type of offence if the person makes an application to the court with an undertaking to produce the vehicle before the court again in the same condition in which it was at the time of the commission of the crime To ensure this condition, the court may direct the applicant to get the coloured photographs of the vehicle taken from different angles However, release should always be subject to the

person furnishing adequate security for the full value of the vehicle sought to be released

3 With the observations made above this application is dismissed

Application dismissed

1991 ALL L J 999

= 1991 Cri L J 3017

B P SINGH J

Chhedi and others Revisionists v State of Uttar Pradesh and another Respondents

C R No 562 of 1989 D -9-4-1991 *

Criminal P C (2 of 1974), Ss 2(d), 200, 204 — Summoning of witnesses — No formal complaint made by applicant — Magistrate cannot summon and examine witnesses in absence of formal complaint

Only allegations made whether orally or in writing to a Magistrate with a view to his taking action under the Code can be termed as a complaint Where the applicant moves an application before the Magistrate with the simple prayer that the Police Officer concerned may be directed to register a case under a particular section and prayer for further direction was made that the Police Officer concerned may also proceed in accordance with law cannot be termed as 'complaint' as defined in S 2(d) of the Code The Magistrate has no power to proceed to examine the applicant and the witnesses u/S 200 in the absence of any formal complaint in this regard (Paras 6, 7)

Vinod Prasad, for Revisionists A G A V P Pathak for Respondents

ORDER — Chhedi and others have filed this application for revision against the order dated 31st January 1989 passed by Additional Chief Judicial Magistrate, Varanasi, in Criminal Case No 2889 of 1988 (Badrun Bibi v Chhedi u S 395 IPC summoning the applicant-revisionists for the offence under S 395 IPC

2 An occurrence took place on 14th September 1988, at about 11 p m in which the applicant-revisionists from one side and Chhedi and others on the other were said to have been involved An FIR of the occurrence was lodged by Haneef at P S Rohania on 15-9-1988 at 7 20 p m u S 323 504 against Umar and others Regarding the same occurrence another FIR was lodged by Smt Badrun Bibi (Respondent No 2) against the applicants u S 323 504 IPC

3 On 17th September, 1988 Smt Badrun Bibi moved an application before the Additional Chief Judicial Magistrate Varanasi u S 156(3), Cr P C praying that Police of P S Rohania be directed to lodge an FIR u/S 394 395 IPC against Chhedi and others and thereafter to take proceeding against them in accordance with law On this application the learned Additional Chief Judicial Magistrate made enquiry from P S Rohania if any case was or was not registered regarding the incident which was mentioned by Badrun Bibi in her application u S 156(3) of the Code of Criminal Procedure hereinafter referred to as the Code

4 S O P S Rohania reported that the allegations of Badrun Bibi regarding the occurrence of dacoity were not substantiated Thereafter the learned Additional Chief Judicial Magistrate examined the witnesses produced by Badrun Bibi and summoned the applicants u/S 204 of the Code The applicants have challenged the summoning order on the ground that the police had submitted the charge-sheet u/S 323/504, IPC regarding the occurrence u/S 395 IPC The learned Magistrate did not reject the charge-sheet, as no formal complaint was filed by Badrun Bibi in the court of the learned Magistrate The order summoning the applicants was against the provisions of law On the other hand, the contention of respondent No 2 was that the learned Magistrate was fully justified in passing the order in question because the evidence led by her before him did make out a case for

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*Against the order passed by A C J M , Varanasi, D/- 31-1-1989

FI/II/A618/91/RAM/VNP

the offence u/S 395 IPC against the applicant-revisionists I have heard the learned counsel for the parties

5 It is not disputed that the basis of the summoning order in question was the application of Badrun Bibi and the statement of Govind Lal Rai and others recorded by the learned Magistrate It is also not disputed that no formal complaint was filed by Badrun Bibi before the learned Magistrate

6 Section 156 of the Code deals with the powers of the Police Officer to investigate cognizable case U/S 156(3) of the Code any Magistrate empowered u/S 190 may order for investigation in a cognizable offence by the Police Officer concerned Chapter XV of the Code deals with the complaints to Magistrate and S 200 specifically provides that a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present if any and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate Thus, it is quite clear that u/S 200 of the Code a Magistrate can take cognizance only if a complaint in this regard is made to him S 2(d) of the Code defines complaint and provides that complaint means any allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person whether known or unknown has committed an offence, but does not include a police report The Explanation to S 2(d) provides that a report made by a police Officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint and the police officer by whom such report is made shall be deemed to be the complainant Thus, it is obvious that only allegations made whether orally or in writing to a Magistrate with a view to his taking action under the Code can be termed as a complaint Where the applicant moves an application before the Magistrate with the simple prayer that the police Officer concerned may be directed to register a case under a particular section and prayer for further direction is made that the police officer concerned may also proceed in accordance with law cannot be termed as complaint as defined in S 2(d) of the Code The Magistrate has no power to proceed u/S 200 of the Code upon such an application Of course the Magistrate can proceed under Chapter XV of the Code if a proper complaint is filed before him in which allegations are made with a view to his taking action under the Code that some persons have committed an offence

7 In the present case the learned Magistrate was not acting legally when he proceeded to examine Badrun Bibi and the witnesses u/S 200 of the Code in the absence of any formal complaint in this regard from her or any one else Thus the summoning order passed by the learned Magistrate cannot be sustained

8 The application for revision is allowed The order dated 31-1-1989 passed by the Additional Chief Judicial Magistrate Varanasi in Criminal Case No 2889 of 1988 Badrun Bibi v Chhedi and others is hereby set aside Badrun Bibi is free to take recourse to law if any such right is available to her

Revision allowed

1991 ALL L J 1000

B P JEEVAN REDDY C J AND
R A SHARMA J

M/s Bharat Rice Mills and others Petitioners v State of U P and another Respondents

Civil Misc Writ No 14644 of 1983 D/- 27 8 1991

(A) U P Krishi Utpadan Mandi Adhiniyam (25 of 1984), S 7 — Market fee — Levy and collection — There is no distinction between a market yard and a sub-market yard

(Para 8)

(B) Civil P C (5 of 1908), O 91, R 1 — Affidavit — Verification — Counter affidavit filed in Court properly verified — Omission

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JL/JI/A1065/91/VNP

to fill up appropriate blanks in copy supplied to petitioners — Inappropriate, but cannot constitute ground for rejecting counter affidavit altogether

(Para 9)

(C) U P Krishi Utpadan Mandi Adhiniyam (25 of 1964), S 17 — Market fee — Quantification/Assessment — Absence of provision — Would not make S 17(iii) unenforceable and ineffective

U P Krishi Utpadan Mandi Rules (25 of 1964), Rr 68, 69

(Para 10)

(D) U P Krishi Utpadan Mandi Adhiniyam (25 of 1964), S 17 — Market fee — Levy of — Rendering of services — Market Committee acquiring land — Proposing to construct buildings thereon — Claim by dealers that from very inception of Committee all the services should be rendered and then alone, they would pay the fees — Not tenable

(Para 11)

(E) Constitution of India, Art 141 — Precedents — Earlier Supreme Court decision by Constitution Bench explained in subsequent judgment — Subsequent judgment, rendered by a smaller bench not laying down any rules of universal application, and also explaining the context in which they were made — This understanding of earlier decision by subsequent smaller bench is binding on High Court.

(Para 12)

(F) U P Krishi Utpadan Mandi Adhiniyam (25 of 1964), S 17 — Market fee — Spending of, by market Committee — Construction of culverts and link roads made in market yard — Serving and promoting objects of Act — Objection as to spending of fee, not tenable

(Para 19)

Cases Referred Chronological	**Paras**
AIR 1986 SC 726	17
1985 SCC Supp 476 (1985) 1 Supp SCR 145	16
1985 UPLBEC 1192	15
1984 All LJ 1221 1984 UPLBEC 1213	14
AIR 1983 SC 617 (1983) 3 SCC 229	16
AIR 1983 SC 1246	12 14
1980 All LJ 490 AIR 1980 SC 1124	
AIR 1980 SC 1008 (1979) 3 SCR 1217	12
AIR 1965 SC 1107	13

Sri S P Agarwal for Petitioner Mr B D Mandhyan for Respondent

B P JEEVAN REDDY, J — This writ petition is filed by as many as ten rice mills situate in Baheri town in District Bareilly for number of reliefs viz —

(i) Restraining the Krishi Utpadan Mandi Samiti Baheri from realising the market fee from the petitioners on transactions of sale and purchase of specified agricultural commodities within the market area of Baheri

(ii) To quash sub-clause (c) of clause (iii) of S 17 of the U P Krishi Utpadan Mandi Adhiniyam 1964 which sub clause was inserted by U P Ordinance No 40 of 1983 with effect from 4 10 1983

(iii) Restraining the Mandi Samiti from demanding and realising additional market fee of 1% on sales of agricultural commodities

(iv) For issuing a Mandamus directing the Mandi samiti to refund the market fee already realised from the petitioners on sales of rice effected within the area of Baheri Mandi Samiti

(v) The refund the amount of market fee collected from the petitioners from 1974 upto 1983

2 The petitioners have come forward with the following averments

The petitioners rice mills are located in Baheri town They are dealing in agricultural produce which is a notified produce under the Act Baheri town has been declared as a market area under section 6 but no notification has been issued under S 7 declaring it as a market yard No services are being rendered by the Mandi Samiti It does not have any plans even for rendering such services in future Construction of buildings necessary for rendering such services is not even contemplated In such a situation, the Mandi Samiti has no right to levy or collect any market fee in May 1983 the petitioners protested against such levy but to no avail Though the petitioners have paid the market fee since 1974 it was under a mistake of law They are entitled to refund of the same The entire transactions of sale and purchase of rice and agricultural produce take place within the premises of the rice mills and not in the market yard if any In such circumstances there would be no occasion for levying or collecting market fee in respect of such transaction By U P Ordinance No 40 of 1983 the Legislature has directed that all the powers of the Mandi Samiti shall be exercised by ad hoc committees Such a provision is unconstitutional The very constitution of the Mandi Samiti is contrary to law The levy of additional market fee by virtue of the amendment made in clause (iii) of S 17 is unconstitutional and incompetent Mandi Samiti has accumulated huge amounts Without spending the same on providing services it cannot recover the market fee It is on the basis of these averments that the aforementioned reliefs are sought

3 The writ petition was filed on 28 11 1983 and on the stay application a Bench of this Court passed the following order —

Issue notice

We direct that until further orders, the respondents are restrained from realising any market fee from the petitioners Petitioners are however liable to pay the licences fee

Dt 28 11 83

Sd HNS J
AB J

However on an application filed by the Mandi Samiti the said stay order was vacated on 10th August, 1984 The petitioners were directed to pay all the arrears of market fee within two months from the date of the said order (dated 10th August, 1984) and to continue to pay the market fee regularly in accordance with law The counsel for the Mandi Samiti, however, gave an undertaking that in case of the petitioners succeeding in this writ petition, the entire fee realised from them shall be refunded with interest at the rate of 18% per annum

4 A counter affidavit has been filed sworn to by Gulabchand secretary Krishi Utpadan Mandi Samiti Baheri wherein the following statements are made

Under S 6 of the Act, Bareilly has been declared as a market area Baheri has been declared as a sub-market yard under S 7 The Mandi Samiti Bareilly is rendering appropriate services to all the traders in the market yard as well as in sub-market yards including Baheri sub-market yard The Mandi Samiti has drawn up plans to construct a market complex at Baheri also Land has been purchased at a cost of Rs 7 40,000/ Some more land is porposed to be purchased and constructions are shortly to begin It is untrue that no services are being rendered The Mandi Samiti has already constructed link roads connecting several villages It has provided tripals, petromax sheaves winnowers and other equipment It is also taking up construction of godowns bridges culverts and plans are afoot to render other services to the trading community If any particular service is not rendered it is always open to the petitioners to demand the same The market fee has been validly levied and being collected The mills of the petitioners are situated in the sub-market area, Baheri and, therefore they are bound to pay the market fee It is of little consequence whether the transaction of sale and purchase takes place within the mill premises or outside the premises Since the mills themselves are situated within the sub-market area, Baheri they are bound to pay the market fee on such transaction in accordance with law Ordinance 40 of 1983 is perfectly valid and competent and no objection can be taken to it on any ground The appointment of ad hoc committees is equally unobjectionable The amendment to S 17(iii) is equally valid and the levy of additional market fee cannot be objected to It is not required of the Mandi Samiti that it should start rendering services first and then demand the fees

5 A rejoinder affidavit has been filed by the writ petitions reiterating the contentions made in the writ petition In particular it is averred that village Baheri has not been notified either as principal market yard or as a sub market yard under S 7 It is also submitted that construction of culverts and link roads is not a permissible activity and that the market fee cannot be utilised for those purposes It is again reiterated that no services are being rendered at Baheri

6 The Uttar Pradesh Krishi Utpadan Mandi Adhiniyam 1954 (hereinafter referred to as the Act) was enacted by the U P Legislature in 1964 to provide for the regulation of sale and purchase of agricultural produce and for the establishment superintendence and control of markets therefor and it has been amended from time to time S 5 provides for the declaration of intention to regulate and control sale and purchase of certain specified agricultural produce in any area and to declare that area as a market area. S 6 provides for declaration of an area as a market area, while S 7 provides for declaration of principal market yard or sub-market yards as the case may be Market yard sare smaller areas within the market area S 9 provides for the effects of the declaration of an area as market area With effect from the date of such declaration no person can establish or continue any place for sale purchase storage etc of the specified agriculrural produce except under and in accordance with a licence granted by the Mandi Samiti Chapter III which contains Ss 12 to 21 provides for constitution of committee their functions and duties S 17 is relevant for our purposes Clauses (i) and (ii) of S 17 provide for grant of licences their renewal suspension and or cancellation as the case may be Clause (iii) provided for levy and collection of market fee In so far as it is relevant S 17(iii) reads as follows —

"17 Powers of the Committee A Committee shall for the purposes of this Act have the power to —

(i)

(ii)

(iii) levy and collect

(a) such fees as may be prescribed for the issue or renewal of licences and

(b) market fee which shall be payable on transactions of sale of specified agricultural produce in the market area at such rates being not less than one per centum and not more than one and half per centum of the price of the agricultural produce so sold, as the State Government may specify by notification and such fee shall be realised in the following manner —

(1) if the produce is sold through a commission agent the commission agent may realise the market fee from the purchaser and shall be liable to pay the same to the Committee

(2) if the produce is purchased directly by a trader from a producer the trader shall be liable to pay the market fee to the committee

(3) if the produce is purchased by a trader from another trader the trader selling the produce may realise it from the purchaser and shall be liable to pay the market fee to the Committee and

(4) in any other case of sale of such produce the purchaser shall be liable to pay the market fee to the Committee

Provided that no market fee shall be levied or collected on the retail sale of any specified agricultural produce where such sale is made to the consumer

7 Mr S P Agrawal learned counsel for the petitioner has urged as many as five contentions which we now proceed to deal with in their proper order The first contention is that Baheri has not been notified as a market yard under S 7 of the Act and until and unless this is done no market fee can be levied For a proper appreciation of this contention it is necessary to notice the precise averments in the writ petition and the counter affidavit in this behalf In paragraph 6 of the writ petition the petitioners have made the following averments —

6 That Baheri District Bareilly has been declared as Market Area under S 5 of the act which consists of Ricchha, Bhaura, Tanda

and some other villages and various other places The mills of the petitioners are located at Baheri Baheri Mandi Samiti has not been notified under S 7 of the Act as market yard

In paragraph 21 of the writ petition the petitioners have stated —

> That under S 7 of the Act the State Government declares Market Yards and sub-market yards in each market area Baheri has not been notified as market yard under S 7 so far

In the counter affidavit filed by the respondents they have met the above averments in the following manner It is stated in paragraph 6 of the counter affidavit

> 6 That the contents of paragraph No 6 of the writ petition are denied as stated Bareilly has been declared as market area under S 6 of the Act which includes Bareilly and other places as well Baheri has been declared as sub-market yard under S 7 of the Act It is wrong to say that Baheri has not been notified as market yard or sub-market yard under S 7 of the Act

In paragraph 21 of the counter affidavit it is stated

> "21 That the contents of paragraph No 21 of the writ petition are not admitted as stated Baheri has been notified as sub-market yard under S 7 of the Act

8 From the above pleadings it is clear that while the petitioners case is that Baheri Mandi Samiti/Baheri has not been declared as a market yard under S 7 of the Act the respondents case is that Baheri has been decalred as a sub market yard under S 7 According to the respondents Bareilly is the principal market yard whereas Baheri is a sub-market yard The learned counsel for the petitioner argued that the counter affidavit contains inconsistent statements He wants us to hold paragraph 6 of the counter affidavit as containing such self contradiction It is in view of this argument that we have taken care to set out paragraphs 6 and 21 of the counter affidavit hereinabove We are unable to find any inconsistency either in paragraph 6 or in paragraph 21 of the counter affidavit The respondents case is clear According to them Baheri has been declared as a sub-market yard under S 7 Learned counsel for the petitioners then argued that when a separate Mandi Samiti is constituted for Baheri, there must be an independent market yard in Baheri According to him Baheri cannot be a sub-market yard, nor can Bareilly be the principal market yard But there is no factual basis for this submission No material has been placed before us to hold that a separate Mandi Samiti has been constituted for Baheri and if so when ? Even if it is assumed that a Mandi Samiti had been separately constituted for Baheri no illegality is involved Baheri is within the district Bareilly According to the respondents Baheri was declared as a sub market yard If subsequently a separate Mandi Samiti has been constituted for Baheri Baheri will still continue to be a market yard It is of little consequence whether it is a market yard or a sub-market yard For the purposes of levy and collection of market fee or in the matter of rendering of services there is no distinction between a market yard and a sub-market yard Even in the rejoinder affidavit, specific date on which a separate Mandi Samiti was constituted for Baheri is not given, nor any notification issued in that behalf has been produced We cannot, therefore, hold that there is no notification declaring Baheri as a market yard/sub-market yard under S 7 The learned counsel for the petitioner insisted that the respondents should be called upon to produce the notification declaring Baheri as a market yard or sub-market yard, as the case may be Indeed, he suggested repeatedly that he would advance his further arguments only after the respondents produced such notification We, however indicated to the learned counsel for the petitioners that we cannot hear the writ petition piecemeal and whatever arguments he has he must advance at one stretch Accordingly, the arguments in the writ petition were concluded We do not think it necessary to call upon the respondents to produce the notification declaring Baheri

as a sub-market yard At no point of time from 1974 to 1983 did the petitioners raise this objection before the Market Committee Specific averment has been repeatedly made in the counter affidavit that Baheri has been declared as a sub-market yard Except a general denial in the rejoinder affidavit no material has been placed to hold that Baheri has not been declared either a principal market yard or a sub market yard We see no reason not to accept the averment made in the counter affidavit, which has been sworn to by a responsible official namely the secretary of the Mandi Samiti Indeed, if the petitioners case is that a separate Mandi Samiti has been constituted for Baheri, they ought to have produced that notification which is turn may have contained a provision for a sub-market yard already declared as such

9 The learned counsel for the petitioner raised an objection that copy of the counter affidavit served upon him does not specifically say as to which paragraphs of the counter affidavit are sworn to by the deponent on his personal knowledge and which on the basis of legal advice We however find that the counter affidavit filed in the court does contain such verification The omission to fill up the appropriate blanks in the copy supplied to the learned counsel for the petitioners no doubt inappropriate cannot constitute a ground for rejecting counter affidavit altogether

10 The second contention urged by the learned counsel for the petitioners is that the Act must contain a provision for quantification of the fee payable by the dealer In other words according to him, there ought to be a provision for assessment of fees and in the absence of such quantification/assessment, no fee can be recovered He submitted that clause (iii) of S 17 of the Act is unenforceable and ineffective for this reasons It is not possible to agree This very contention has been rejected by the Supreme Court in its decision in Ram Chandra Kailash Kumar v State of U P AIR 1980 SC 1124 (1980 All LJ 490) dealing with this very enactment This is what the Court says in paragraph 10 of the judgment dealing with an identical contention

But the levy and collection of fee by the temporary Market committees is not illegal as argued on behalf of the appellants A machinery for adjudication of disputes is necessary to be provided under the rules for the proper functioning of the market committees We have already observed and expressed our hope for bringing into existence such machinery in one form or the other But it is not correct to say that in the absence of such a machinery no market fee can be levied or collected If a dispute arises then in the first instance the Market Committee itself or any sub-committee appointed by it can give its finding which will be subject to challenge in any court of law when steps are taken for enforcement of the provisions for realisation of the market fee

The learned counsel for the Mandi Samiti has explained that there is indeed no occasion or necessity for an assessment inasmuch as the market fee is calculated on the basis of the entries made in the bills issued by the dealer himself He also clarified that if at any point of time any dispute is raised the market committee will examine the same in accordance with law In this connection it would be appropriate to refer to Rules 66 68 and 69 framed under the Act Under Rule 66 the levy is upon the seller Rule 68 declares that market fee on specified agricultural produce shall be payable as soon as such produce is sold in the principal market yard or sub-market yards in accordance with the terms of and conditions specified in the bye-laws Sub-rule (2) of Rule 68 prescribes the manner of realisation while Rule 69 provides for issuance of receipt by servants of the Market Committee for the market fees received from any person From 1974 to 1983 the petitioners have been paying the market fee in accordance with the said rules and the bye-laws and no difficulty was ever envisaged It is evident that this contention is raised in this writ petition merely for the purpose of avoiding the payment of market fee In this connection we think it permissible to point out that market fee is an indirect levy It is passed on to the consumer The levy is normally upon the seller except where the seller happens to be the producer himself The impost is passed on to the consumer though omission or failure to pass on is no ground for avoiding the payment of fee The situation is no different broadly speaking from Sale Tax The second contention is accordingly rejected

11 The third contention of the learned counsel for the petitioners is that no services are being rendered in Baheri Market Yard/Sub-Market Yard and hence no fee can be collected Certain observations from judgments of this court are relied upon in support of this contention There can be no dispute about the proposition that in case of a fee of this nature element of quid in case of a fee of this nature element of quid pro quo ought to be there We however think it necessary to clarify the position Mandi Samiti constituted under the Act is in the nature of a local authority It is State within the meaning of Art 12 of the constitution It is a statutory body created in accordance with the provisions of the Act to perform certain statutory duties in particular regulation of sale and purchase of agricultural produce and establishment superintendence and control of markets therefor Mandi Samiti is not a business proposition It cannot be postulated that before Mandi Samiti is entitled to levy and collect any market fee it ought to acquire and provide all the requisite paraphernalia to render the services which it is contemplated to provide by the Act To be more precise it is not expected of the Market Committee to acquire land construct buildings recruit all the necessary staff purchase all instruments etc and start rendering services before it can levy and collect the market fee No such pre-condition can be stipulated or contemplated What happens is that after the constitution of the Market Committee it starts rendering services with the limited staff and equipment it has acquired and starts collecting moneys and expanding its services As and when the money flows in it will acquire buildings purchase the necessary equipment and so on It is a gradual process We must also take into account the normal difficulties of such committees Obstructions are placed at every stage For example if the land is sought to be acquired there will be writ petitions or other proceedings to stall and/or delay the proceedings Construction of buildings may also take time Even recruitment of staff would not be free from problems All these present day difficulties must be taken into account while examining a plea of the nature advanced herein that the market Committee is not rendering all the services May be that it is not rendering all the services which it is supposed to render This may be for the reason that it has not yet constructed the requisite buildings or that it has not recruited all the necessary staff and so on But some services it is rendering and it intends to expand and provide more and more services as and when it constructs buildings and acquires other necessary paraphernalia This is what exactly the Mandi Samiti has stated in its counter affidavit It has detailed the services which it is already providing It has offered to provide such services as are demanded by the dealers in so far as its capacity permits It has acquired land It proposes to construct buildings and it is then that it will be in a position to render all the necessary services The dealers would not be justified in saying that from the very inception of the Committee (Market Committee) all the services should be rendered and then alone they would pay the fees We do not think that any such plea can be countenanced It is in the light of these observations that we have to examine the several cases cited at the Bar on behalf of the petitioners

12 Particular reliance was placed upon certain observations in Ram Chandra Kailash Kumar (supra) which in a general way tend to support the petitioners argument We do not think it necessary to set out the said observations because in a subsequent judgment of the Supreme Court in Sreenivasa

General Traders v State of A P AIR 1983 SC 1246 these very observations have been expressly referred to and explained as not laying down any legal principle of general application (vide paragraphs 28 to 32) Faced with these observations in Sreenivasa General Traders (supra) the learned counsel for the petitioners took the stand that inasmuch as Ram Chandra Kailash Kumar (supra) and Kewal Krishan Puri (1979) 3 SCR 1217 (AIR 1980 SC 1008) were decided by a constitution bench and Sreenivasa General Traders (supra) by a Division Bench (comprising three Judges) a smaller Bench cannot lay down a proposition contrary to the decision of a larger Bench The observations in the earlier cases continues to be a good law and is binding upon this court is preference to the observations in Sreenivasa General Traders says the counsel We are afraid we cannot give effect to this argument It is not a case of inconsistency between the judgments of the Supreme Court in which case different rules apply It is a case where an earlier judgment no doubt rendered by a constitution Bench is explained in a subsequent judgment rendered by a smaller bench as not laying down any rules of universal application and also explaining the context in which they were made This understanding of the earlier decision by the subsequent smaller Bench is binding upon us a High Court cannot say that this understanding of the subsequent smaller bench is incorrect or unwarranted The learned counsel then submitted that Sreenivasa General Traders (supra) was decided with reference to the Andhra Pradesh Act and whatever is said therein cannot hold good in respect of the Uttar Pradesh enactment It is not possible to agree We are referring to those observations in Sreenivasa General Traders where they have explained the observations in earlier judgments which were of course rendered with reference to the U P enactment It cannot be said that those observations are confinced A P Act It is not as if those observations were made while construing a provision peculiar to A P Act They were dealing with the very same argument of fee and service A mechanical explanation that since Sreenivasa General Traders is rendered within reference to the A P Act everything said therein is irrelevant in the case of the U P Act is to over simplify the matter and ignore the essence and dicta of the judgment of the Supreme Court

13 Before proceeding further it would be appropriate to point out the distinction between regulatory fee and compensatory fee In the case of former the concept of service to payer is absent while in the latter there ought to be element of service It is true that even a regulatory fee ought to be reasonable but the requirement of service to person paying the fee is not there The regulation may really be in the interest of the general public or a section thereof even so fees can be collected from the person subjected to regulation By way of illustration we may take the case of foodgrains licensing Dealing in foodgrains is a fundamental right It is however regulated by orders made under the Essential Commodities Act The place of storage the books to be maintained the hours of business — are sometimes even the price — is regulated Violation of these provisions renders not only the foodgrains liable to confiscation but the dealer may also be sent to jail on conviction Here there is no service to him The regulation is in the interest of general public Yet a fees is charged for grant of such licence Even under the Mandi Samiti Act there is a licence fee apart from market fees In the case of latter service concept ought to be there, broadly speaking In this behalf reference may be had to the law laid down in para 8 of the judgment of Supreme Court in Corporation of Calcutta v Liberty Cinema AIR 1965 SC 1107

14 Learned counsel for the petitioners placed particular reliance upon certain judgments of this Court which we think necessary to deal with at this juncture The first case relied on is Shree Mahalakshmi Vyapar Kendra v Krishi Utpadan Mandi Samiti Powayan 1984 UPLBEC 1213 (1984 All LJ 1221) that was a case where the dealer was carrying on business in a village which was not situated within a Market yard or a

sub-market yard The village was, no doubt, situated within the market area Market fee was demanded from him in respect of his transactions It was held by the Court that unless service is rendered in the Market area as distinguished from Market yard/sub-market yard no fee can be demanded In that connection the Court distinguished, the fact and contentions in Sreenivasa General Traders (supra) The learned counsel relied upon this decision to hold that Sreenivasa General Traders having been rendered with reference to A P Act is not relevant in a case arising under the U P Act but no such proposition was enunciated by the Division Bench in Shree Mahalakshmi Vyapar Kendra

15 The next case relied upon by the learned counsel for the petitioner is U P Forest Corporation v Krishi Utpadan Mandi Samiti, 1985 UPLBEC 1192 In particular paragraphs 13 to 19 of the judgment are relied upon In the said paragraphs the Division Bench reiterated the principles enunciated in Ram Chandra Kailash Kumar and Kewal Krishna Puri (supra) This decision does not lay down any proposition that unless the services are rendered first, by acquiring all the necessary paraphernalia, no fee can be levied It was also held to the said decision that provision for lighting, cleaning sweeping etc are not services contemplated by the Act, since these are the services rendered by the Municipality/local authority of the area But as pointed out hereinbefore in the Baheri Sub Market Yard, several distinct services are being rendered and steps are also being taken to construct buildings on the land already acquired for providing more and more services as contemplated by the Act

16 We may in this connection refer to a very instructive decision of the Supreme Court in ITC v State of Karnataka, 1985 SCC Supp 476 decided under the Karnataka Act The decision discusses elaborately the changing concept and meaning of compensatory fee and quid pro quo In particular it holds that levy imposed by the Market committees on sellers in the markets for making a contribution to the State Roads and Bridges Fund maintained under the State Motor Vehicles Taxation Act for construction and maintenance of roads and for providing transport facilities for the markets is a valid levy and is for purposes relevant to the Act This decision approves the reasoning of an earlier decision of the Supreme Court in Municipal Corporation v Mohammed Yasin, (1983) 3 SCC 229 (AIR 1983 SC 617) where it was held that mere fact that there were several others besides those paying the fees who were also benefited did not detract from the character of the fee It was further observed that the benefit and advantage to the payers of the fee might even be secondary as compared with the primary motive of regulation in the public interest It was observed that all that was necessary is that there should be a broad co relationship between the impost and the services

17 Yet another case relied upon by the learned counsel for the petitioners is Om Prakash Agarwal v Giri Raj Kishori AIR 1986 SC 726 a case arising under the Haryana Rural Development Fund Act On an examination of the relevant facts and circumstances it was found by the Court therein that there is absolutely no quid pro quo and hence levy of fee cannot be sustained nor can it be sustained as a tax We are unable to see any relevance of the decision in the facts of the instant case

18 The fourth contention urged by the learned counsel for the petitioners is that where the paddy is produced within the Baheri Market area and is milled and the resultant rice sold within the same market area, no market fee can be levied He submitted that even in such cases fee is being levied So far as the proposition goes, it is not disputed by Sri B D Madhyan learned standing counsel for the Market Committee He agrees with the correctness of the said proposition What he however, submits is that in each case it is a question of fact If the trader proves that rice being sold is hulled

from the paddy which has already suffered market fees within the same Market area, no market fee will be charged thereon In view of this stand taken by the learned standing counsel for the Mandi Samiti, we do not think it necessary to dilate upon this contention As and when any levy is made contrary to the said proposition, it is always open to the trader concerned to raise a dispute in that behalf in accordance with law

20, The last and final contention of Sri S P Agarwal, learned counsel for the petitioners, is that the Mandi Samiti has not passed its budget, as required by Rule 46 9' and that the District Magistrate in whom the powers of the Mandi Samiti has been invested has not delegated these powers to SDMs It is also submitted that Mandi Samiti was not competent to spend any part of the market fee collected by it on construction of culverts, link roads kharanjas The first two submissions have been denied in the counter/affidavit and so far as the third aspect is concerned we cannot say that construction of culverts and link roads does not ultimately serve and promote the objects for which the Act was made It is not submitted that these constructions have been made outside the Market Yard So long as these constructions are made within the Market Yard/Sub Market Yard no objection can be taken thereto The judgment of the Supreme Court does not say that even within the notified market yard such construction cannot be undertaken

20 For the above reasons, the writ petition fails and is accordingly dismissed There shall be no order as to costs

Petition dismissed

1991 ALL L J 1009

= 1991 Cri L J 3232

PALOK BASU AND P P GUPTA, JJ

Pachrangi and others Appellants (in Jail)
v State of U P Respondent

Criminal Appeal No 327 of 1979 D/-4-3-1991 *

(A) U P Children Act (1 of 1952), S 27 —Benefit of — Availability — Murder — Accused aged 14 years on the date of incident — Appeal in High Court — Accused becoming 28 years of age at the time of judgment thereof — He cannot be directed to be sent into an approved school or being detained there — Conviction sustained and sentence reduced to already undergone

Penal Code (1860), Ss 34, 300

1990 Cri LJ 2671 (SC) Rel on

(Paras 16, 19)

(B) Penal Code (1860), S 300 — Murder — Mens rea — Disassociating oneself after sudden happening of an incident — Can and should not be presumed to indicate his association with the criminal intention of others at the time of the offence

1961 (2) Cri LJ LJ 278 (SC) Rel on

(Para 13)

Cases Referred Chronological	**Paras**
1990 Cri LJ 2671 1989 All Cri R 276 AIR 1989 SC 1329 1990 All LJ 65 (Rel on)	14, 16
1962 (2) Cri LJ 278 AIR 1962 SC 1198 (Rel on)	13

G S Chaturvedi and P K Tiwari, for Appellants, Dy Govt Advocate, for Respondent

PALOK BASU, J — This appeal has been filed by Pachrangi Sinder Singh and Chandra Prakash against their conviction u/S 302/34, IPC and sentence of imprisonment for life as awarded by II Addl Sess Judge Shahjahanpur on 16-1-1979 in Sessions Trial No 351 of 1978

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*Against judgment and order of B K Misra, 2nd Addl Sessions Judge, Shahjahanpur, D/-16-1-1979

2 An incident is said to have happened at about 10 p m on 21-8-1977 in the precincts of the Railway Station Maigalganj, District Shahjahanpur Ram Kumar, P W 3, was employed in the said Railway Station and P W 2 Salig Ram had come to see him They were on a charpai At the station platform, four other travellers were asleep, one of whom was sleeping on the cement bench Three appellants reached there when appellant Pachrangi fired at the person who was sleeping on the Bench from his tamancha (country made pistol), appellant Sinder Singh delivered blows with a Hatta (Iron rod) and appellant Chandra Prakash beat him with his hands after catching hold of him Alarm was raised by Salig Ram and Ram Kumar who also flashed their torches Electric light was also available The appellants were known to them from before A chase was given Constable Chhatrapal Singh and another constable were coming from opposite direction and all the three appellants were ultimately arrested then and there Pachrangi was found in possession of a Katta from within which an empty cartridge was found Sinder Singh was carrying the iron-rod The appellants and the recovered articles were taken to the police station Maigalganj where Ram Karan Singh P W 7, prepared memos in respect of the recovered articles The blood-stained Kurta of appellant Pachrangi was also taken into possession Salig Ram lodged a FIR on the basis of which a case was registered in the general diary Ext Ka 14 The case was sent to the police station G R P Shahjahanpur where S O Bhim Singh, P W 5, took up the investigation as he was station officer G R P then Uma Shankar, P W 1, constable made the necessary entries in the general diary Post mortem examination was performed by Dr K A Abbas, P W 6 on 23-8-1977 who found the following injuries on the person of the deceased

Ante Mortem Injuries

1 Incised wound 6 cm x 5 cm x bone on the right side of face on the right external ear The external ear was cut into two separate pieces, margins were clean cut Direction was transverse The [illegible] bone was [illegible]

2 Circular multiple lacerated [illegible] wounds 3 cm x 1 5 cm x cavity deep on the right side of abdomen upper part Margins were inverted and irregular Blackening and singeing of hair was present Single wound was 0 5 cm x 0 5 cm x cavity deep Liver was perforated at multiple places below the injury

3 The deceased was, however an unknown Muslim man whose whereabouts could not be ascertained After completing the investigation, charge sheet was filed against the appellants It may be mentioned here that the sealed packets containing the clothes, pellets tickles and earth, relating to the case were kept in packet, as is proved by the statement of Head constable Raghunath Singh, PW 8 and Head Moharrir Pratap Narain, P W 9 The Chemical Examiner opined in his reports Exts Ka-15 and Ka-16 that human blood was found on the iron rod, the shirt and the earth

4 The accused appellants denied their participation in the occurrence and attributed false implication due to enmity They, however did not lead any evidence in their defence The learned Trial Judge after placing implicit reliance on the theory propounded by the prosecution and on the testimony of Salig Ram Ram Kumar, Chhatrpal Singh and Bhim Singh, P W 2 P W 3, P W 4 and P W 5 respectively, held that the spot arrest is duly proved and there was no reason to doubt the prosecution case about the assassination of the unknown deceased at the railway station and, therefore convicted and sentenced the appellants as noted above Hence this appeal

4A Sri G S Chaturvedi, learned counsel for the appellants assisted by Sri Ramesh Sinha has been heard at length in support of this appeal whereas Sri A K Dwivedi, learned A G A has appeared on behalf of the State prosecutor The entire record has been thoroughly placed and minutely examined

5 It goes without saying that if the theory of arrest at the spot is believed, there will be no reason to discard the prosecution story that the accused-appellants had committed [illegible] the prosecution S [illegible] however [illegible] round

of the allegations in the prosecution case itself and also on the ground of some legal requirements consisting two appellants namely Sindar Singh and Chandra Prakash which points will be dealt with a little later

6 Sri A K Dwivedi learned A G A has vehemently argued that the learned trial Judge has correctly appreciated eye-witness account inasmuch as he had the opportunity to examine the demeanour of P W 2 Salig Ram and P W 3 Ram Kumar and therefore reasons set out in his judgment may be accepted by this court and the witnesses testimony regarding proving the arrest may be believed

7 It may be noted that none of the three witnesses namely Salig Ram and Ram Kumar, who of course are public witnesses as well as Chhatrapal Singh who is a constable in the police had any reason whatsoever to depose falsely against the appellants They have been thoroughly cross-examined From the statement of Salig Ram it appears that at one stage he has stated in his cross-examination that the Station Officer had arrived on a motor-cycle he chased the accused on Motor cycle and returned after one or one and half hours and said that the accused and the weapons have been recovered It was further, stated in the cross-examination that the Station Officer got the FIR written in the next morning on which he had put his thumb marks On the strength of this statement Sri Chaturvedi argued that the theory of spot arrest should be discarded

8 The aforesaid statement of Salig Ram, however does not merit discarding of his entire statement It may be remembered that in the FIR as well as in his examination-in-chief and also in the cross-examination the consistent case of the said witness had been that the three appellants were arrested by the members of the public including himself, Ram Kumar and Chhatrpal Singh, constable whereafter the recovery was made and memos relating to their arrest and recovery were duly prepared, they were carried to the police station whereafter the FIR was lodged at 23 30 p m on 21-8-1977 It may be remembered that the incident had happened at 10 30 p m in the night

9 There is not an iota of evidence in the cross-examination as to why Salig Ram should be at all talking against the appellants Similar is the position of Ram Kumar In the cross-examination we do not find even a suggestion that there were ulterior motives for falsely implicating the appellants There is another circumstance going much against the appellants Appellant Pachrangi was medically examined the next after-noon after he was sent for medical examination He was found to sustain several injuries the timing of which squarely tallies with the time of their arrest The shirt which he was wearing had blood stained marks These circumstances remain wholly unchallenged by the defence On the facts and circumstances of the present case it cannot certainly be believed for a moment that the prosecution has fabricated the entire case against the appellants for no rhyme or reason

10 It was sought to be made out by the learned counsel for the appellants that since the whereabouts of the deceased could not be ascertained by the prosecution the story propounded by it should be discarded It may be remembered that if the prosecution starts with the theory of spot arrest , it runs the risk of disproving the offence in the event of failing to prove the spot arrest after the incident In such cases one may not go about investigating the whereabouts of the deceased should be satisfied on the evidence and materials forthcoming that all the accused were nabbed by the members of the public and police constables just after committing the crime In the instant case it has proved beyond reasonable doubt that the appellants were arrested at the railway station in the manner alleged by the prosecution immediately after committing the crime The Investigating Officer, therefore did not go to find out as to who the deceased was who was killed by the appellants It may be remembered that it was railway station where the incident had happened and electric light was available This fact has gone unchallenged Apart from this P W 2 and P W 3 have referred to using their torches at the relevant time and in view of this statement the testimony of the three eye-witnesses Salig Ram,

Ram Kumar and Chhatrapal Singh inspire confidence and has to be relied upon

11 The post-mortem report corroborates the prosecution story in so far as use of iron rod and the country made pistol by the appellants Sindar Singh and Pachrangi are concerned, therefore, the participation of these two appellants is also fully established from the independent circumstances of finding injuries on the deceased attributed to the weapon used by these two appellants

12 This is the stage where the argument of learned counsel relating to participation of Chandra Prakash, or even if his participation is believed, offence for which he may be convicted, has to be examined It is admitted to the prosecution that Chandra Prakash was unarmed No role of exhortation is attributed to him The passenger who was killed ultimately, was sleeping It is rightly argued that under the circumstances there was absolutely no reason or justification for the appellant Chandra Prakash 'to catch hold of the sleeping man It is further argued as to why should he catch hold of the object of murder when he was already asleep? It sounds too improbable to accept that appellant Chandra Prakash should risk his own life by embracing the deceased and permitting the other appellants to fire at the object Simultaneously it is argued that why should Chandra Prakash presume that Pachrangi was having a country made pistol with him? The prosecution case is not that Pachrangi was openly exhibiting the said pistol It is after he had removed Chadar covering the face that he is said to have fired at the deceased Similarly, it is asked as to why should Chandra Prakash appellant expect that his companion Sindar Singh appellant will use the iron-rod which was a common appliance, hardly expected to be used as a weapon' Consequently, it is argued that Chandra Prakash appellant cannot be saddled with the liability of S 34, IPC i e sharing the intention of the other accused

13 The prosecution case against Chandra Prakash may have to be noted here all over again in order to see whether he can be said to have shared the common intention It is nobody's case that Pachrangi had been openly exhibiting his fire arm or that the small iron rod in the hands of Sindar Singh was a weapon at all No role of exhortation had been attributed to Chandra Prakash No motive whatsoever existed Chandra Prakash could not expect that he is going to a place where he will meet a target which he has to kill Similarly, it cannot be presumed on the facts and circumstances of the present case that Chandra Prakash had reason to know any motive with either Pachrangi or Sindar Singh to perpetrate the present crime The theory of embracing the sleeping target appears too improbable to believe Chandra Prakash may be risking his life by that action and it is difficult to attribute the said action to the accused at that hour Under these circumstances, even if the presence of Chandra Prakash is believed at the site, it cannot be said that he was sharing the intention of murder held by remaining accused The argument of Sri Dwivedi that it was expected of Chandra Prakash to disassociate himself from the rest of the accused if he were not sharing the common intention, must be rejected It may be remembered that not disassociating oneself after sudden happening of an incident can and should not be presumed to indicate his association with the criminal intention of others at the time of the offence The pronouncement of the Supreme Court in the case of Banwari Lal v State reported in AIR 1962 SC 1198 (1962 (2) Cri LJ 278) supports this view, Under the circumstances, Chandra Prakash appellant should get benefit of doubt as the charge u/S 302/34, IPC as against him has not been proved to the hilt

14 Learned counsel for the appellants then argued that Sindar Singh even though tried and convicted on the basis of the evidence produced could not have been tried with the rest of the accused and awarded sentence of imprisonment in view of the provisions contained in U P Children s Act It has been brought to the notice of the court that district-Shahjahanpur became a notified district within the meaning of U P Children s Act 1951 vide Notification No 5246/xxxvi-Sw-32(p)/67 dated November 23, 1967 which was enforced [illegible] from December [illegible] 1971 Reliance [illegible] the decision of the Supreme Court in Bishan Rao [illegible] State of

U P reported in 1989 All Cri R 276 (1990 Cri LJ 2671)

15 It may be noted that the appellant must have been aged only about 14 years on the day of incident as his age has been noted as 16 years on 12-1-79 in his statement u/S 313, Cr P C No contrary opinion has been recorded by the learned Judge

16 A person under 16 years is a child within the meaning of the U P Children Act S 27 of which provides that no court shall sentence a child to imprisonment for any term Therefore, Sindar Singh could not have been sentenced to life imprisonment by the Trial Judge He may have been sent to an approved school However since the appellant should now be of about 28 years, he cannot be directed to be sent to an approved school for being detained there It thus appears appropriate to direct as was done in Bhoop Ram s case (1990 Cri LJ 2671) (supra) that appellant Sindar Singh's conviction be sustained and his sentence be quashed For the reasons discussed above the appellant Sindar Singh need not be sent to jail again in view of the decision and the provisions cited above Consequently while the appellant Sindar Singh s conviction u/S 302/34, IPC is upheld his sentence on the facts and circumstances of the present case is reduced to the period undergone as no useful purpose will be served by directing a retrial

17 As regards the appellant Pachrangi he has been rightly convicted u/S 302/34, IPC and sentenced to life imprisonment There is no force in his appeal which is hereby dismissed His age has been noted as 22 years on 12-1-1979 and therefore no question of extending any benefit to him as available to Sindar Singh arises

18 In view of the aforesaid discussion the appeal is partly allowed The conviction and sentence awarded to Pachrangi are maintained He is on bail He will surrender to his bail bonds and serve out the sentence awarded to him

19 Sindar Singh appellant has been rightly convicted u/S 302/34, IPC but his sentence is reduced to the period already undergone giving him the benefit of the U P Children s Act He is on bail He need not surrender to his bail bonds His bail bonds are hereby discharged

20 The appellant Chandra Prakash is acquitted of the charges u S 302 34, IPC as the case is not proved beyond reasonable doubt against him and the sentence of life imprisonment is set aside He is on bail He need not surrender to his bail bonds His bail bonds are discharged

Appeal partly allowed

1991 ALL L J 1013

= 1991 Cri L J 3236

A P MISRA AND S R SINGH, JJ

Shvambir Petitioner v State of U P and others Respondents

Habeas Corpus Writ Petn No 32413 of 1990 D/- 19-2-1991

National Security Act (65 of 1980), S 3 — Preventive detention — Public order — Single incident of kidnapping coupled with firing in air — Nobody injured or killed in public to create panic — Not a case of public order but law and order — Detention vitiated (Paras 2, 3, 4)

Cases Referred Chronological	**Paras**
1989 Cri LJ 2303 AIR 1989 SC 2265	3

Ram Babu Sharma for Petitioner, A G A, for Respondents

A P MISRA, J — This petition is directed as against the order of detention dated 29th August 1990 passed by the District Magistrate Ghaziabad (Annexure 1 to the present petition) u/S 3 of the National Security Act The aforesaid detention order was served on the petitioner in the District Jail Meerut as he was detained in pursuance of earlier FIR dated 1st of August 1990 The grounds of detention have been delineated in Annexure-2 to the writ petition The ground of detention is based on one single incident for which the aforesaid First Information report u/S 365/307 IPC was lodged as against the petitioner and also on the ground that there is likelihood of the petitioner being released on bail The version as disclosed in the first information report dated 1-8-90 In short is that on 1st of August 1990 one Rakesh who also runs an Electrical shop at Vijai Nagar in the district of Ghaziabad had reported to respondent No 1 about the incident in which victim Kuldeep aged about 14 years student of Class 8 was kidnapped at 1-30 p m when he was returning from his school He was taken on a Motor Cycle by two unknown persons Both the accused were initially prevented by many students but since they fired from their fire-arms to terrorise them, they could not catch and ultimately the accused ran away It has further been submitted in the petition that on the same day of the incident a police party went in search of the victim namely Kuldeep and co-accused Mukesh Tyagi and on the pointing out of Satendra accused, who had been arrested earlier, victim Kuldeep was recovered and the police party also arrested Mukesh Tyagi co-accused It is this incident in the first information report which is the foundation of order being passed u/S 3 of the National Security Act

2 The contention raised on behalf of the petitioner is that the said incident is a single incident and secondly, it is not a case of public order At the most, it may be a case of law and order On behalf of the respondent an argument was raised that this Hon'ble Court as well as the Supreme Court time and again have been holding that even one single incident is sufficient to make it a case of public order and thus merely one incident as is the case in the present petition would not absolve the petitioner from the legal position It was further contended that Hon'ble Supreme Court had further approved an order passed under the preventive law where the detaining Authority was satisfied that the detenu was likely to be released on bail and there was every possibility that the detenu may continue to repeat such offences in case he is released from detention The contention on behalf of the respondent on the proposition of law is not in doubt Each case has to be examined on the facts of that case It is true that if a single incident itself constitutes a case of public order or where there is likelihood of the detenu being released on bail and chances of it recurring the crime which might affect th public at large, it is within the competence of the detaining Authority to pass such order

3 Turning to the facts of the present case we find that it is a single incident of kidnapping a boy of 14 years from a college by two persons including the petitioner It has been very elaborately pointed out by the petitioner that initially he had been released on bail but on a desire being expressed, the Magistrate concerned in fact passed an order for identification of the accused in jail and ultimately the petitioner has not been identified in the said identification parade However since a regular criminal trial/case is pending, we are not expressing any opinion in the matter, lest it might affect the said trial However on the facts of the present case we find that even though it is alleged that while running away the two accused persons carrying the boy who is alleged to have been kidnapped, fired in the air, the case on behalf of the respondent is not that while running away taking the said boy firing was made and anybody was injured or killed in the public to create any panic Thus, merely firing at the public place by itself would not constitute a case of public order We find that in the present case, there is merely a bald statement made out in the grounds of appeal, which has been recorded by the learned counsel for the State in the counter-affidavit/grounds of detention As we have held that mere bald statement would not be sufficient to hold a case to be of public order to the similar effect apart from various authorities it was also held in Abdul Razzak v S N Sinha Police Commissioner Ahmedabad, reported in AIR 1989 SC 2265 (1989 Cri LJ 2303)

4 We have given our anxious consideration and we are clearly of the view that it is not a case of public order but only a case of law and order In view of this finding, the present detention order is illegal

5 In the result, we accordingly hold, the detention order dated 29th August, 1990 passed by the District Magistrate Ghaziabad (Annexure 1 to the petition) u/S 3 of the National Security Act is illegal and accordingly we direct the respondents to set the p[illegible] S[illegible] from the d[illegible] the aforesaid provisions of

law forthwith unless he is required in connection with some other case

6 With the aforesaid observation the present petition is allowed

Petition allowed

1991 ALL L J 1015

= 1991 Cri L J 3238

G D DUBE J

Brahmanand Rai Petitioner v State of U P and others Respondents

Criminal Revn No 1104 of 1990, D/-30-1-1991 *

Criminal P C (2 of 1974), Ss 137(2), 133 — Public nuisance — Proceedings u/S 133 — Conditional order for removal of obstruction to public passage passed — Denial of public right — Suit already filed in respect of passage in dispute — Deemed to be reliable evidence in support of denial of public right — Proceedings u/S 133 stayed till final disposal of Civil Suit in view of S 137(2)

(Paras 10, 11)

Cases Referred Chronological Paras

1989 All LJ 295 1989 Judicial Interpretation of Crimes 272 5 10

1980 All LJ 672 1980 All Cri C 214 7 10

Chandra Kumar Rai and Fauzdar Rai for Petitioner A G A and T Rathore, for Respondents

ORDER — This revision has been preferred against the judgment and order of Sessions Judge Mau The Sessions Judge has allowed the revision filed by the opposite party and set aside the order of the Magistrate making conditional order u/S 133 of the Code of Criminal Procedure (hereinafter referred to as the Code) final

2 The facts of the case are not much disputed On the report of the Station Officer, Koopaganj, district Mau dated 6-8-1989 complaining that Swami Nath Rai has encroached public passage by keeping bricks across it a conditional order was issued on 23-8-1989 asking Swami Nath Rai to remove the obstacle He appeared on the date fixed and stated that no public passage existed The opposite-party filed an application requesting the Magistrate to start proceedings u S 144 of the Code The learned Magistrate had asked the Naib Tahsildar to make a local inspection Swami Nath Rai was asked to produce evidence regarding denial Besides other evidence he had filed copy of complaint regarding a suit filed by him The learned Magistrate did not accept documentary evidence relating to denial produced by the opposite-party Hence he made the conditional order final and asked Swami Nath Rai to remove obstruction in the passage

3 Swami Nath Rai filed a revision before the Sessions Judge The Sessions Judge held that Suit No 22 of 1990 was in respect of passage in dispute He had held that, as long as the suit was pending the case u S 133 of the Code could not proceed He also held that the evidence regarding denial was sufficient There could be no other better evidence than the suit itself It was therefore held that the learned Magistrate had erred in confirming the conditional order On the above observations the impugned order was passed

4 It has been argued by learned counsel for the applicant that the case could proceed even though the suit was filed It was stated that the suit was filed on 9th February 1990 and the conditional order was passed on 23-8-1989 Since the conditional order was prior in time the final order passed by the lower court should not have been set aside

5 Learned counsel for the applicant has relied upon Rama Shanker Shukla v State of U P 1989 Judicial Interpretation of Crime 272 (1989 All LJ 295)

6 Learned counsel for the opposite party argued that if the lower court wrongly decides that there was no reliable evidence with regard to denial of existence of public way it assumes jurisdiction not vested in it by law It was argued that the Sessions Judge has rightly interfered in the matter and set aside the order of the Magistrate making conditional order final

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* Against judgment and order of R R Jatav Addl Judge Mau D/-23-5-1990

7 Learned counsel for the opposite party has relied upon a case in Mahabir Singh v State 1980 All Cri C 214 (1980 All LJ 672)

8 It is not disputed that in respect of the very passage in dispute a civil suit is pending Even though it has been filed after initiation of the proceedings u/S 133 of the Code, the learned Magistrate ought to have stayed proceedings and asked the parties to get their rights declared in the competent court of jurisdiction

9 The learned Magistrate ought to have considered the scope of enquiry u/S 137 (2) of the Code This sub-sec (2) reads as under

"If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial he shall stay the proceeding until the matter of the existence of such right has been decided by a competent court, and, if he finds that there is no such evidence, he shall proceed as laid down in S 138

10 The Sessions Judge has rightly held that there was evidence regarding denial of public way In both the case law cited above, it was held by Hon'ble V P Mathur J in Rama Shanker Shukla's case (1989 All LJ 295) and Hon'ble P N Bakshi J in Mahabir Singh's case (1980 All LJ 672) that the pendency of a suit being accepted by the court below, it should be deemed to be reliable evidence in support of denial of public right In such a circumstance, the proceedings u/S 133 of the Code should remain stayed till final disposal of the civil suit

11 In view of what has been said above, the order of the Sessions Judge should partially be modified

12 In the result, the revision succeeds and is partly allowed The order of lower court is modified to this extent that the proceedings before the lower court shall remain stayed till the final disposal of the civil suit pending between the parties

Order accordingly

1991 ALL L J 1016

= 1991 Cri L J 3244

H C MITAL AND K NARAYAN, JJ

Khushali, Appellant (From Jail) v The State, Respondent

Criminal Appeal No 146 of 1980 D/-25-1-1991

(A) Evidence Act (1872), S 32 — Dying declaration — Doctor sending for Magistrate for recording — Doctor himself recording declaration as Magistrate was out of town — Held, that dying declaration was sufficient for basing conviction

The dying declaration in the instant case, bears the thumb impression of the deceased and it is further apparent that the statement made by him was read-over to him and he after fully understanding it put his thumb impression It is true that a dying declaration should have been recorded by a Magistrate, but the Doctor first sent for the Magistrate and when it was reported that he was out of town, he himself was most capable and authorised person to record the same The Doctor maintained that he apprehended that the injuries could result into the death of the deceased Therefore the dying declaration was itself sufficient to base conviction of accused (Para 8)

(B) Criminal P C (1974), S 216 — Alteration of charges — Accused convicted u/Ss 302 read with S 34 — Conviction can be altered to one u/S 302 simplicitor

1956 Cri LJ 291 (SC), Foll (Para 10)

Cases Referred	**Chronological Paras**
1956 Cri LJ 291 AIR 1956 SC 116 (Foll)	10

D D Kaushik, for Appellant Dy Govt Advocate, for Respondent

JUDGMENT — Khushali has preferred this appeal against his conviction and sentence u/S 302 read with S 34 IPC to life imprisonment passed by Sri V V Singh, the then Addl Sessions Judge, Aligarh by his judgment dated 6-10-1979

2 Prosecution case in brief is that the appellant Khushali was wanted in a dacoity case and he was absconding, hence under S 87/88 Cr P C his belongings were attached and given in the Supurdgi of deceased Narain who was a distant uncle of appellant Khushali Smt Jaidevi wife of Teja, after her husband's death she had developed illicit intimacy with Narain deceased, who also used to cultivate the land of Smt Jaidevi Hence Khushali bore ill will towards the deceased which was further bolstered when his belongings after attachment were taken in his supurdgi by Narain deceased It is said that the appellant had sent threats to Narain to return his goods to him, otherwise he would teach him a lesson The incident is alleged to have taken place on 18-12-1964 at about 5 a m in the town of Khair District Aligarh According to the prosecution Smt Jaidevi and Khushali approached the house of Narain and knocked the door and on Smt Jaidevi asking the deceased to open the door the same was opened and Narain came out with a burning earthen lamp in his hand, immediately thereupon Khushali is alleged to have inflicted knife injuries to Narain On hearing the alarm raised by the deceased his brother Luxman, Bhudeo and Gowardhan neighbours arrived Ramji Lal village Chaukidar as well as Farid Khan also arrived On seeing the witnesses Khushali made good his escape, while Smt Jaidevi was apprehended on the spot Immediately thereafter FIR of the occurrence was lodged by Luxman at 5-30 a m at P S Khair at a distance of about three furlongs, on the basis of which case u/S 307, IPC against Khushali and Jaidevi was registered The injured was taken to the hospital where his injuries were examined by Dr R C Vedi at 6 a m and he noted the following injuries on his person —

1 Incised punctured wound 1¼" x 1/3" (middle) x abdominal cavity deep on front of right side anterior abdominal wall Out of the wound 4" of mesentery is plolapring Wound is profusely bleeding, no clothes Situated 2½" above the umblicus and 1½" to the right of middile

2 Incised wound 2/3" x 1/8" x muscle deep on the back of middle third of left fore-arm

3 Incised wound 1/2" x 1/6" x skin deep on the front of left arm 1¼" above the elbow

4 Abrasion 1/2" x 1/4" on the back of left hand

5 Incised punctured wound vertical 1½" x 1/4 x abdominal cavity deep on left side back in the lumber region 2" above the iliac crest and 2" left of spine wound is profusely bleeding

6 Incised punctured wound 1½" x 1/2" x chest cavity deep on left side back 3½" below the inferior angle of left scapula and 4" left of spine Portion of muscle and fascia plolapring

7 Two abrasions 1/2" x 1/4" each on the front of left and right knees

3 Dr Vedi had also informed the police and requested the Tehsildar to record the dying declaration through letter (Ex Ka-24), but he was not available hence he himself recorded the statement (Ex Ka-25) of Narain, who subsequently succumbed to his injuries when he was sent to Aligarh Hospital in the way On receipt of information of the death at P S Kotwali at 11 a m S I Ram Charan Singh reached bus stand and prepared the inquest report His dead-body was sent for postmortem and Dr K C Dubal on 18-12-1964 had done the autopsy, prepared the postmortem report (Ex Ka-26) and noted as follows —

Ante mortem Injuries

1 Stitched wound (on opening) punctured wound with incised margin 1½" x 1/4" x abdominal cavity deep right side abdomen 2½" above umblicus

2 Abrasion 1/2" x 1/4" right wrist back outer portion

3 Punctured wound with incised margin 1/4" x 1/8" x bone deep left arm and other portion

4 Punctured wound with incised margin 3/4" x 1/8" muscle back left forearm and inner portion

5 Abrasion 1/2" x 1/6" x back left hand

6 Stitched wound (on opening) punctured wound with incised margin 1, 3/4" x 3/4" chest cavity deep back left side lower anterior portion

7 Stitched wound (on opening) punctured wound with incised margin (P torn) abdominal cavity (paper torn) back (p torn)

4 On internal examination left lung was found punctured Peritonium, stomach, both the intestines and lever were found ruptured In the opinion of the Doctor death was caused due to shock and haemorrhage about eight hours prior to 5 p m on 18-12-1964

5 The appellant Khushali had absconded hence earlier Smt Jaidevi was tried, found guilty and convicted for the offence u/S 302 read with S 34, IPC, subsequently after arrest of the present appellant he was tried and to prove its case prosecution examined in all fourteen witnesses, of whom P W 1 Ramji Lal, Chaukidar, P W 2 Gowardhan, P W 3 Farid Khan are the witnesses of the occurrence P W 4 Ram Singh is son of Narain-deceased P W 13 Dr R C Vedi had examined the deceased when he was brought injured at the P H C and thereafter recorded his statement before death (Ex Ka-25) P W 14 Dr K C Dubal had done the autopsy Besides these Investigating Officer one other formal witness was examined Version of the appellant has been that he has been falsely implicated He denied that he was absconding, but admitted that attachment of his properties had taken place in his absence and alleged that he has been falsely implicated The learned trial Judge believed the prosecution evidence, hence convicted and sentenced the appellant as above On being aggrieved, this appeal has been preferred It was urged that the prosecution evidence on record was not worthy of credence

6 The occurrence had taken place early in the morning at about 5 a m It was, therefore argued that it was very doubtful that any of the witnesses could be present at the scene of occurrence, that some one might have come in the dark and might have attacked him From the statement of the Investigating Officer (P W 12) Inspector Ram Babu Sharma who had done the investigation it is clear that the FIR was dictated in his presence and recorded that he had gone to the scene of occurrence on the same day prepared the site plan (Ex Ka-14), recovered blood-stained and sample earth from there Thereafter he had gone to the hospital and by that time the Doctor had already recorded the statement and as the Doctor told him that the patient was conscious he had also recorded the statement (Ex Ka-15) and that immediately thereafter he had sent the deceased to the District Hospital Aligarh for treatment when on reaching there he died He has also stated that on the spot he had found one burning earthen lamp and had recorded the statement of the witnesses In his cross-examination the fact that the authenticity of the site plan recovery of the blood on the scene of occurrence as shown therein and taking in possession of the burning earthen lamp were not challenged From the map it is clear that he found blood on the door of the house and not inside the house which fully corroborates the prosecution case that when the deceased came out of the house with an earthen lamp then he was attacked To that effect there is evidence of P W 1 Ramji Lal Chaukidar that after his beating in the night when he was going to ease himself on hearing alarm he reached the house of the deceased and saw that an earthen lamp was burning there and also Khushali was inflicting knife blows to Narain, Smt Jaidevi was also there, that he himself and other persons apprehended Jaidevi However, Khushali managed to make good his escape Thereafter he and Luxman had taken Jaidevi to the police station He also stated that Luxman and Bhudeo had died and, therefore, their testimony could not be recorded The fact that the contents of the FIR dictated by Luxman were the same as dictated by him has been proved by S I Jagdish Prasad Pandey (P W 10) who was then posted as Head Moharrir at P S Khair and had recorded the FIR and thereafter entered the case in the G D That apart, his statement remains unchallenged and, therefore, there is no reason to doubt the veracity of his statement that he had correctly recorded what was dictated by Luxman

7 P W 2 Govardhan has also deposed that on hearing the alarm he had reached

house of Narain and then saw that Khushali was inflicting knife blows to Narain while Jaidevi was standing outside there On seeing him and other persons Khushali took to his heels, while Jaidevi was apprehended He also stated that Jaidevi was Bhabhi of the appellant He also stated that his house was only at a distance of twenty paces from the house of the deceased That there was also moon light The occurrence had taken place on 17-12-1964 while the statement of this witness was recorded after more than thirteen years on 18-7-1978 He admitted that in the meantime his eyes and ears had become defective Neither he could see nor hear

8 Lastly, P W 3 Farid Khan has also stated that along with the Chaukidar he had also reached there and saw the appellant escaping with a knife, that he and Ramji Lal tried to apprehend the appellant, but could not succeed, while Jaidevi was apprehended on the spot He also stated that because the Chaukidar was pursuing him he had also run after him and he did not see his face Even if his testimony on that count is ignored, there remains testimony of PW 1 Ramji Lal Chaukidar and P W 2 Gowardhan coupled with dying declaration (Ex Ka-25) recorded by Dr R C Vedi The statement of the deceased (Ex Ka-25) is as follows —

Mera Naam Narain putra Girwar Aayu Qarib 55 Saal Kachhi Sakin Mohalla Sharafan Khair Ka Rahne Wala Hun Mai Issamai Hosh Men Hun Atah Sab Kuchh Samajhta Hun Mai Apne Ghar Ke Kothe Men So Raha Tha Ki Aaj Subah koi Paanch Baje Mere Kothe Par Darwaza khatakane Ki Aawaz Hui Aur Mujhse Aawaz De Kar Darwaza Khulwane Ko Kaha Aawaz Teja Kachhi Ki Aurat Ki Thi Maine Diya Jalaya Aur Darwaza Khola Darwaza Kholne Par Maine Dekha Teja Ki Bahu Aur Khushali Kachhi Bahar Tha Khushali Kachhi Ne Mujhe Pakar Liya Aur Chaqu Se Kai Jagah Mara Maine Khushali Ko Aur Teja Ki Aurat Ko Diye Ki Roshani Men Pachan Liya Tha Maine Shor Machaya Aur Shor Par Luxman, Gowardhan, Bhudeo Aur Dusre Bahut Se Mohalle Ke Aadmi Aagaye Mujhe Sidhe Aspatal Le Aaye Ilaj Ke Liye Maine Sab Sun Kar Tasdiq Kiya, Sab Theek Hai Mai Hosh Men Hun Aur Sab Kuchh Samajhta Hun

L T I
Narain
(It contains a note of Dr Vedi)

That this dying declaration was recorded by him because Tehsildar II Class Magistrate was out of town He further certified that the injured Narain son of Girwar was in full senses and capable of giving dying declaration The dying declaration also bears the thumb impression of the deceased and it is further apparent that the statement made by him was readover to him and he after fully understanding it put his thumb impression It is true that a dying declaration should have been recorded by a Magistrate but Dr Vedi first sent for the Magistrate and when it was reported that he was out of town he himself was most capable and authorised person to record the same In his cross-examination Dr R C Vedi (P W 13) has further maintained as he apprehended that the injuries could result into the death of the deceased He had sent for the Magistrate to record his dying declaration No suggestion was made in his cross-examination on behalf of the defence that he had not recorded correctly whatever was stated by the deceased or that the deceased was not in a position to make the statement as recorded by him Under the circumstances this dying declaration of the deceased is itself sufficient to base conviction of the appellant

9 That apart, there is also evidence on behalf of the prosecution of Gowardhan (PW 2) whose presence at that time has been mentioned in the dying declaration corroborating the fact that he had seen this appellant inflicting knife blows and Jaidevi was apprehended at that place The other two witnesses namely, Laxman who had lodged the FIR and Bhudeo had died when the trial of this appellant had taken place Smt Jaidevi who was apprehended on the spot was tried earlier and has been convicted and sentenced under Section 302 read with Section 34, I P C This appellant had absconded and was apprehended after about thirteen years and in the meantime these two eye witnesses had died

10 The conclusion, therefore, is that there is sufficient clinching evidence to bring home guilt to the appellant beyond reasonable doubt His conviction is to be maintained The present appellant alone had inflicted fatal blows with the knife to the deceased The learned trial Judge has convicted him under Section 302 read with Section 34, I P C He should have been convicted under Section 302 I P C simpliciter The law is well settled that the conviction under Section 302, I P C can be converted to one under Section 302/34, I P C and vice versa, if no prejudice is caused to the accused appellant, vide W Slaney v State of M P, AIR 1956 SC 116 (1956 Cri LJ 291) In the present case in the charge as well as in the statement under Section 313, Cr P C it was specifically put to the appellant that he had stabbed the deceased and the evidence is also to the effect that he alone had stabbed the deceased Hence conviction of the appellant is altered from Section 302 read with Section 34, I P C to Section 302 I P C simpliciter and his sentence of life imprisonment is confirmed He is in prison, he has to serve out the remaining sentence

Order accordingly

1991 ALL L J 1020

= 1991 Cri L J 3139

PALOK BASU AND B P SINGH, JJ

Dori and another, Appellants v State of U P, Respondent

Criminal Appeal No 1161 of 1984, D/- 9-8-1990 *

(A) U P Dacoity Affected Areas Act (31 of 1983), Ss 2(b) and (e) and 6(2) — Penal Code (1860), Ss 302, 323, and 394 — Trial by special court — Expression "Scheduled Offender" — Accused primarily charged under S 302 which is a scheduled offence — Charges also framed u/Ss 323 and 394 — Allegation that accused attempted to take away gun of deceased — Accused do not fall within definition of "scheduled offender" — Trial by Sessions Court is legal — Case could not be tried by special Judge as claimed (Para 6)

(B) Criminal P C (1974), S 386 — Conviction of accused u/S 302, Penal Code — Conviction and sentence confirmed by High Court — Concession in regard to sentence since accused was in jail for 12 years — Held, that minimum sentence awardable u/S 302 is life imprisonment and hence sentence could not be reduced

Penal Code (1860), S 302 (Para 11)

(C) Criminal P C (1974), S 432 — Remission of sentence — Accused convicted u/S 302 and sentenced to life imprisonment — Conviction and sentence affirmed by High Court in appeal — Accused seeking direction by High Court to State Govt for some remission of sentence — Held, that the accused could apply before State Govt in that regard (Para 11)

Pratap Narain Misra, Tej Pal, and B B Paul, for Appellants, Govt Advocate, for Respondents

PALOK BASU, J — This appeal has been filed by two brothers Dori and Kamal Singh. These two and two others, namely, Babu Kumhar and Narain Singh were accused in Sessions Trial No 159 of 1983 Babu Kumhar and Narain Singh remained absconders, as such their trial could not proceed The appellants have been convicted u/Ss 302/34, I P C and 323/34 IPC relating to the causing of death of Ganga Ram and causing injuries to Ram Roop, P W 2 and sentenced to imprisonment for life and 1 year R I each. The charge u/S 394, IPC has been held not proved

2 According to the prosecution story, an incident happened on 12-11-1982 around 1 p m in village Khadih (P S Kh[illegible]) district Agra, in which the aforesaid four accused were named as having come to the fields in the possession of the prosecution side well armed Dori, Kamal Singh and Babu Kumhar were allegedly carrying fire-arms (Guns) while Narain Singh was armed with lathi. It

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*Against judgment and order of G L Gupta IXth Addl Dist and Sessions Judge, Agra D/- 6-4-1984 said that in the fields of the said village the appellants and the absconding accused came with the common intention to commit murder of Ganga Ram and others and in furtherance of the said common intention the said Ganga Ram was done to death while Ram Roop was assaulted with the butt of the gun and the lathi by one of the accused The charge further was that while fleeing after the incident, the accused took the gun of the deceased Ganga Ram, hence the charge u/S 394, IPC was also framed

3 The accused denied their participation and claimed to be tried They attributed their implication due to enmity and pre-existing animosity relating to politics

4 In order to prove the case, the prosecution has examined in all ten witnesses It may be noted that PW 2, Ram Roop is the injured witness while PW-3,Naththi Lal is the informant, who is the brother of the deceased Ganga Ram P W 4, Om Shankar is yet another eye witness Dr A K Jain, PW-1 examined the injuries of Ram Roop on 13-11-1982 at 3-25 p m at the District Hospital, Agra Dr R K Sharma, P W 10 conducted the post mortem examination on the dead body of Ganga Ram on 13-11-1982 at 3-45 p m Raj Narain PW-5 happened to be the constable who carried the dead body for postmortem examination Subedar Singh Chauhan PW-6 is the witness of the inquest report Budha Singh P W 7 is another witness of the inquest report, who belongs to the village of the incident Onkar Singh is the Head Constable at P S Kahdauli, who prepared the Chik Report Indra Dutt Sharma P W 9 is the Investigating Officer, who after due investigation filed a charge sheet against the appellants and the two absconding accused

5 Shri Tej Pal, learned counsel for the appellants, raised a preliminary objection to the trial having been held by the IXth Additional Sessions Judge, Agra His argument was that since Agra falls within the area declared as the dacoity affected area, the trial could, under the circumstances, be held by a Special Judge appointed under the U P Dacoity Affected Areas Act, 1983 Reliance was placed upon S 6 of the said Act which reads as follows —

"S 6 Jurisdiction of Special Courts

(1) Notwithstanding anything contained in the Code of Criminal Procedure 1973 or any other law for the time being in force a scheduled offence shall be triable only by a Special Court

(2) In trying any scheduled offences a Special Court may also try any offence other than such offence with which a scheduled offender may be charged at the same trial under any law for the time being in force

6 In order to examine the validity of the argument a look has to be had at the definition of scheduled offence as also scheduled offender For ready reference they may be quoted here

"scheduled offence" in relation to a dacoity affected area means an offence, specified in the schedule to this Act being an offence committed by a scheduled offender

"scheduled offender means a person who commits or has committed or is accused of committing or attempt to commit dacoity or robbery as such or being so connected with scheduled offence as to form part of the same transaction, whether such offence has occurred at the same time and place or at different times and places "

There is no doubt that Shri Tejpal is right in arguing that S 302 IPC is a scheduled offence, but the other limb of his argument that because it happened to be a scheduled offence the trial u/S 302, IPC could be held by a Special Judge is misconceived A close scrutiny of the definition of "scheduled offence" and scheduled offender indicates that if the scheduled offence was committed by a scheduled offender then only the Special Judge will have exclusive jurisdiction to try a case which may primarily involve offence of dacoity or robbery as one of the transactional ingredients Therefore, the argument that since there was a charge u/S 394 IPC in the instant trial, the case ought to have been tried by a Special Judge, loses ground As indicated above, the instant case was primarily that of a murder and incidentally while fleeing an attempt was allegedly made to take away the gun of the deceased Ganga Ram Under the circumstances the appellants would not fall within the definition of scheduled offender and as such the Sessions Judge or for that matter the trial Judge was fully competent to try the case u Ss 302 323 and 394, IPC Therefore the preliminary objection is hereby rejected

7 Coming to the merits of the case it has been argued by Shri Tejpal that Ram Roop s injuries were about 23 hours later and that he too belonged to village Sadabad falling within the district of Mathura his presence, therefore, at the site is doubtful and the injuries appear to have been fabricated In this connection, it was emphasised that even though there is a P H C in the village of the incident and there was a note in the Majroobi Chiththi that the injured should be sent to P H C there is no evidence to indicate as to how and why the said injured was ultimately asked to go to Agra Shri R P Tripathi, Assistant Government Advocate, appearing on behalf of the State of U P has argued that there is an endorsement in the document (Majroobi Chiththi) showing that the case was referred to District Hospital, Agra, and consequently the said injured Ram Roop was carried to the said hospital by Constable Girish Chand bearing No 236 It appears that the name of the Constable is also found noted in the Majroobi Chiththi The cross-examination of P W 1 Dr A K Jain indicates that the existence of the injuries on Ram Roop were not challenged by the accused Some alternative mode of causing those injuries was suggested Under the circumstances, we are unable to accept the argument of Shri Tejpal that Ram Roops injuries were fabricated though he was not present at the scene of occurrence or that he was deposing falsely in the instant case It was argued that PW-3, Naththi Lal, the informant, has made serious contradictions in his statement as a result of which his presence at the Site may also be doubted In this connection attention of the Court was drawn to his statement, (i) that Panchayat Nama was done at the police station, [illegible] had received gun shot marks [illegible] were no gun shot marks on the tractor The argument proceeds that if the tractor had no marks of pellet anywhere, it follows that neither Naththi Lal nor Ram Roop was present and therefore, it further follows that the witnesses were not present at the scene of occurrence Shri Tripathi replied by saying that so far as the causing of some pellet marks is concerned, that is meaningless on the facts of the present case because the witness explained that he never said that there were marks of injuries on the tractor The second argument of Shri Tripathi was that Naththi Lal lodged the FIR at the Police Station at 3-45 p m There is no reason to doubt that the FIR was lodged at the said time and manner Therefore, it is argued that Naththi Lal's presence at the site is fully corroborated by the independent circumstance i e lodging of the FIR

8 After considering the matter with all sincerity we are of the view that neither the presence of Naththi Lal at the site can be doubted nor can it be said that there is any such contradiction as would warrant rejection of his testimony by us It may be noted that the incident had happened at 1 00 p m It was broad-day light P W 4 Om Shanker, who is an independent witness is available to the Court for leading corroboration to the statement of Naththi Lal It may further be noted that Om Shanker was also present and has been named in the FIR Therefore, the FIR also stands fully corroborated not only by post-mortem report but also by the statements of Naththi Lal, Om Shanker and Ram Roop

9 The third and final point vehemently argued by Shri Tejpal was that the post mortem report does not corroborate the manner of the incident suggested by the prosecution Attention of the Court was drawn to the injuries sustained by the deceased Ganga Ram It was argued that since the Doctor had noted " direction probe roughly of wound upward , the prosecution story about the gun shot injury on the deceased Ganga Ram should be rejected We do not find any force in the argument raised by Shri Tejpal It may be noted that the fire arm injuries were just below the shoulder and the margins were inverted and, therefore, the direction was

upward as the pellets were not necessarily to remain static In this connection Shri Tejpal drew the attention of the Court to another fact that the C O who was allegedly present at the Police Station when the FIR was lodged has not been examined with the result that the statement of the Investigating Officer about the lodging of the FIR also becomes doubtful and the medical testimony as noted through the injury report and the post mortem report would not lend corroboration to the prosecution story It is true that the C O has not been examined for no obvious reason and the record is silent as to why the presence of the C O was not secured by the prosecution However, it does not cause any damage to the prosecution story since we are placing implicit reliance upon the evidence as revealed through the statements of Ram Roop Naththi Lal and Om Shanker

10 In view of the discussions aforesaid, the prosecution has succeeded in proving the case against the appellants and they have been rightly convicted and sentenced

11 Shri Tejpal then argued that the appellants had already been in jail for nearly 12 years and some concession in this regard shoud be made by this Court It may be noted that the minimum sentence awardable under S 302 IPC by the Courts is life imprisonment hence no reduction is possible As to the argument that a direction be issued that some remission may be made by the State Government it is always open to the appellants to move proper application for remission before the State Government Whenever such an application is moved, it will be decided in accordance with law

12 With the aforesaid observations the appeal is dismissed The appellants are in jail They will serve out the sentence awarded by the court below

Appeal dismissed

1991 ALL L J 1023

= 1991 Cri L J 3226

B P SINGH, J

Jodh Singh and others Applicants v State of Uttar Pradesh and another Opposite Parties

Criminal Revn No 1699 of 1990 D - 18-4-1991

Penal Code (45 of 1860), S 504 — Offence u/S 504 — Complaint not disclosing provocating words used by accused or his intention to cause Complainant to break public peace or to commit any other offence — Accused cannot be summoned for offence u/S 504

Provisions of S 504, IPC are attracted only when firstly, the accused insults the complainant secondly, the insult must be of such a nature that it should be a provocation to the complainant, and thirdly, that the accused intended or knew that the provocation was likely to cause the complainant to either break public peace or commit any other offence Further in a complaint u/S 504, IPC the complainant must mention the actual words which were used by the accused while insulting him/her otherwise the court will not have enough material before it to come to a conclusion whether the words used by the accused amounted to intentional insult

(Paras 5, 6)

Where the only allegation in the complaint is that when the complainant resisted the attempts by the accused to evict her forcibly from the land in her tenancy, the accused persons abused her in filthy words but neither the complainant has given out the actual words in her complaint which were said to have been used by the accused nor she has stated in her complaint that she was provoked by the insulting abuse, the accused could not be summoned for the offence u/S 504, IPC

(Para 7)

H C Nayak for Applicants, B N Agrawal, for Opposite Parties

FI/GI/A656/91/MPP

ORDER — Jodh Singh and two others have filed this application for revision against the order dated 13-6-1990 passed by IInd Additional C J M Jhansi in Criminal Case No 1434 of 1990

2 Smt Indra, wife of Bulbinder Singh, had filed a criminal complaint against Jodh Singh, Smt Amrit Kaur and Har Prasad, u/S 500, IPC in the Court of IInd Additional C J M Jhansi Learned magistrate had examined Smt Indra u/S 200, Cr P C and witnesses Har Dayal Singh and Kanhaiya Jaswal u/S 202, Cr P C

3 Learned A C J M, after going through the statement of the complainant and hearing the witnesses, was of the view that an offence u/S 504, IPC was made out against Jodh Singh and others Consequently, learned magistrate summoned the applicants vide order dated 13-6-1990 Aggrieved by the order of the learned magistrate, Jodh Singh and others have come in revision

4 I have heard learned counsel for the parties and have gone through the record of the case The main contention of the learned counsel for the applicants is that on the basis of the allegations made in the complaint as well as in the statements of the witnesses, no offence u/S 504 IPC was made out against the applicants and as such the learned A C J M Jhansi acted illegally in summoning the applicants In my opinion the above contention has force S 504, IPC reads as follows —

> "504 Intentional insult with intent to provoke breach of the peace — Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both "

5 On a perusal of the above quoted section it is quite clear that provisions of S 504 IPC are attracted only when, firstly, the accused insults the complainant, secondly, the insult must be of such a nature [illegible] should be a provocation to the complainant and thirdly that the accused intended or knew that the provocation was likely to cause the complainant to either break public peace or commit any other offence If any one of these three ingredients is missing the accused cannot be said to have committed an offence u/S 504 IPC

6 In a complaint u/S 504, IPC the complainant must mention the actual words which were used by the accused while insulting him/her otherwise the court will not have enough material before it to come to a conclusion whether the words used by the accused amounted to intentional insult Further more the complainant must give out in the complaint that the accused intended or knew that insulting words used by him were likely to provoke the complainant in either to break the peace or to commit some other offence

7 In the present case the only allegation in the complaint is that when the complainant resisted the attempts by the accused to evict her forcibly from the land in her tenancy, the accused persons abused her in filthy words The complainant has not given out the actual words in her complaint which were said to have been used by the accused Not only this the complainant has also not stated in her complaint that she was provoked by the insulting abuse Where the complaint no where discloses that the insulting words used by the accused had provoked her or that the accused intended or knew that the provocation was likely to cause the complainant either to break the peace or commit any other offence, the trial court was not justified in summoning the accused for the offence u/S 504, IPC Under these circumstances the order of the learned magistrate summoning the applicants for the offence u/S 504, IPC cannot be upheld

The application for revision is allowed The order dated 13-6-1990 passed by learned IInd A C J M, Jhansi in Criminal case No 1434 of 1990 (Smt Indra v Jodh Singh) is hereby set aside As the application has been filed u/S 500, IPC, it shall remain open to the court concerned to proceed in accordance with law

R [illegible] allowed

1991 ALL L J 1025

S D AGARWALA AND
S C VERMA, JJ

Sri Padam Chand Goyal, Petitioner v. State of Uttar Pradesh and others, Respondents

Civil Misc Writ No 134 of 1982, D/- 21 8 1991

(A) Constitution of India, Art 226 — Natural justice — Lease of nazul land — Application by petitioner for grant of lease in his favour — Proceedings before Collector initiated on such application — Order of Collector after giving opportunity to petitioner for keeping land vacant — Challenge as to, before State Govt — Opportunity to petitioner to make representation necessary

Where proceedings before the Collector for renewal of lease of nazul land was initiated because of the filing of an application by the petitioner for granting lease in his favour and thereafter the Collector passed the order for keeping the land vacant for public use after consideration of the evidence produced by the petitioner, it was incumbent upon the State Government before finally disposing of the proceedings challenging the order of the Collector, to give an opportunity to the petitioner to make a representation so that all the facts may be brought to the notice of the State Government. Granting of an opportunity of representation was necessary because of the fact that the basis of the order of the Collector was the evidence produced by the petitioner though it was not incumbent upon the State Government to give an oral hearing before passing the impugned order.

AIR 1971 SC 1093, Foll. (Para 13)

(B) Constitution of India, Art 226 — Speaking order — Lease of nazul land — Reasoned order by Collector not granting lease in any party's favour and for keeping land vacant for public use — Reversal of order of Collector by State Government without giving reasons and without considering evidence of claimants for lease — Not valid

(Para 5)

Cases Referred Chronological Paras

1990 Cri LJ 2148 : AIR 1990 SC 1984 [illegible]
AIR 1971 SC 1093 : (1971) 1 Lab LJ 256 (Foll) [illegible]

Sri Ratnakar Bharti, for Petitioner; S. C. for Respondents.

S D AGARWALA, J — This is a petition under Art. 226 of the Constitution of India.

2. The land in dispute is an area of 252 Sq. yards of open nazul land, situate in Phatak Suraj Bhan, Belanganj, Agra. This land is adjoining to the house of the petitioner Padam Chand Goyal as well as to Kanhaiya Lal, respondent No. 3.

3. On 19th November, 1946 the Collector, Agra, granted a lease of the land in dispute in favour of Kanhaiya Lal who was then a minor along with his mother Smt. Angoori Devi wife of Munni Lal Vaish, the father of the respondent No. 3, for a period of thirty years with effect from 15th May, 1946. A lease deed was thereafter executed in favour of the respondent No. 3 and Smt. Angoori Devi.

4. A dispute in regard to the land arose after the lease expired on 15th May, 1976. Initially Kanhaiya Lal applied for renewal of the lease. By an order dated 20th May, 1978 the Collector, Agra ordered renewal of the lease in favour of Kanhaiya Lal, but before the lease deed could be executed and registered an application was made by the petitioner Padam Chand Goyal objecting to the grant of the lease in favour of Kanhaiya Lal and on 27th August, 1980 he also made an application before the Collector, Agra not only for cancellation of the order granting lease in favour of Kanhaiya Lal, but also seeking renewal of the lease of the land in his favour.

5. It appears thereafter the Collector, Agra, got a report from the Administrator, Nagar Mahapalika, Agra, in regard to the land in dispute. After examining the relevant facts and the recommendations made by the Administrator, Nagar Mahapalika, Agra, the Collector, Agra, by his order dated 8th December, 1980 cancelled his previous order dated 20th May, 1978 and further directed

that the lease of the land in dispute shall not be given to Kanhaiya Lal or to anybody else but the land shall be kept as a vacant land for public use on the basis of a recommendation of the Administrator Nagar Mahapalika Agra

6 Kanhaiya Lal respondent No 3 challenged the order dated 5th December 1980 before the Secretary Local Self Government Department Lucknow The petitioner also on 16th April, 1981, filed an application before the Secretary Local Self Government Department Lucknow for an opportunity of hearing before passing final orders in regard to the land in dispute The State Government by its order 18th December 1981 cancelled the order of the Collector dated 8th December 1980 and restored the order dated 20th May 1978 for renewal of the lease on certain conditions It is this order dated 18th December 1981 which has been impugned in the present writ petition

7 We have heard the learned counsel for the parties and the learned Standing Counsel

8 Learned counsel for the petitioner has raised two contentions before us to challenge the order dated 8th December 1991 His first contention is that on 16th April, 1981, the petitioner had filed an application before the Secretary Local Self Government Lucknow, requesting him to give him a notice of the proceedings pending before him and he be afforded an opportunity of adducing evidence In effect, the application, according to the petitioner, was to afford an opportunity of oral hearing to the petitioner and since no oral hearing had been granted to the petitioner before passing the impugned order, the order is vitiated in law

9 The second submission of the learned counsel is that the impugned order does not contain any reasons whatsoever as to why the order of the Collector, Agra, dated 8th December, 1980, had been set aside and, consequently the contention is that the order is wholly arbitrary and void in law

10 In so far as the first contention of the learned counsel is concerned it is no doubt true that from a perusal of the order dated 8th December 1980 passed by the Collector Agra it is clear that the order had been passed after the proceedings were initiated on an application having been moved by the petitioner for grant of a lease in his favour The order was also based on the report of the administrator Nagar Mahapalika Agra It is also clear from the order that the petitioner had filed evidence before the Collector, Agra to establish his case that the lease be granted in his favour The Collector Agra had passed the order after considering the evidence filed by the petitioner as well as after considering the recommendations made by the Administrator Nagar Mahapalika, Agra. In the last paragraph of the order, it has been specifically stated that a copy of the order be sent to the Administrator Nagar Mahapalika, Agra the District Registrar Agra the Sub-Registrar, Agra Kanhaiya Lal Agarwal and Padam Chand Goyal, the petitioner

11 In paragraph 26 of the petition it has been stated that the petitioner was never informed by the State Government of any date when the matter would be taken up for consideration No notice or information of any kind whatsoever was given to the petitioner and the order dated 18th December 1981 was ex parte The contention consequently, is that the order dated 18th December 1981 is violative of principles of natural justice as no oral hearing had been afforded

12 In paragraph 22 of the counter affidavit given in reply to paragraph 26 of the petition it has been averred on behalf of the State Government that it is not necessary for the State Government to give any personal hearing to the petitioner It has been further stated that on receipt of the representations of the petitioner as well as of the respondent No 3, namely Kanhaiya Lal, a report was called for from the Collector Agra, and, therefore the matter was considered at great length and the Government passed the impugned [illegible]

Kanharva Lal The application which was made by the petitioner on 16th April 1981 was for granting him of an opportunity of adducing evidence It is consequently admitted by the State Government that it did not grant either oral hearing or an opportunity to the petitioner to file a representation and his evidence in support of the same

13 It is not disputed that proceedings before the Collector was initiated because of the filing of an application by the petitioner and thereafter the Collector had passed the order dated 8th December 1980 The order was also passed after consideration of the evidence produced by the petitioner Since the petitioner was a party to the proceedings before ther Collector Agra and the order was passed after giving him an opportunity of producing evidence in support of his case in our opinion it was incumbent upon the State Government before finally disposing of the proceedings challenging the order dated 8th December 1980 to give an opportunity to the petitioner to make a representation so that all the facts may be brought to the notice of the State Government Granting of an opportunity of representation was in our view necessary because of the fact that the basis of the order of the Collector Agra dated 8th December 1980 was the evidence produced by the petitioner We however do not agree with the submission made by the learned counsel for the petitioner that it was incumbent upon the State Government to give an oral hearing before passing the impugned order

14 In Union of India v J P Mitter AIR 1971 SC 1093 the Hon ble Supreme Court has held that personal hearing is not necessarily an incident of the rules of natural justice and it must be given to a party likely to be affected by an order except in proceedings in Courts A mere denial of an opportunity of making an oral representation will not, without more, vitiate the proceedings A party likely to be affected by a decision is entitled to know the evidence against him and to have an opportunity of making a representation He however cannot claim that an order made without affording an opportunity of personal hearing is invalid In view of this dictum of the Supreme Court it cannot be accepted that the impugned order is vitiated because no oral hearing was given to the petitioner but as observed above it was necessary for the State Government to give an opportunity to the petitioner of making a representation before passing the impugned order

15 In the circumstances though no oral hearing was required but yet the petitioner was entitled to an opportunity to file his representation Consequently the order though not bad on the ground of not giving an opportunity of personal hearing but the petitioner was entitled to file his presentation in support of his case This opportunity admittedly was not granted to the petitioner In the circumstances so far as the submission made by the learned counsel for the petitioner is concerned in regard to the grant of oral hearing it cannot be accepted but in our opinion the petitioner was entitled at least for an opportunity for making his representation in support of his case

16 In regard to the second submission we have examined the order and we find that in fact no reasons have been given at all as to why the order of the Collector dated 8th December 1980 be set aside The Collector had given specific reasons that it was in public interest not to lease the land to anybody else and keep the land as open land for the benefit of the public This order was passed in view of the recommendation made by the Administrator Nagar Mahapalika, Agra It was also stated in the order of the Collector that the respondent No 3 had violated the conditions of the lease and, as such he was not entitled to renewal of the lease in his favour None of the findings given by the Collector has been set aside No evidence has been considered which was filed by the petitioner as well as by the respondent No 2 The report of the Administrator Nagar Mahapalika, Agra has also not been considered It was incumbent upon the State Government before setting aside the order of the Collector dated 8th December, 1980 to give reasons as to why the State

Government did not agree with the findings recorded by the Collector Agra

17 In S N Mukherjee v Union of India AIR 1990 SC 1984 1990 Cri LJ 2148 it has been specifically laid down by the Supreme Court that even in the case of a decision by an administrative authority reasons must be recorded except in cases where the requirement is dispensed with expressly or by necessary implication In the instant case the impugned order of the State Government affects civil rights of the petitioner The order of the Collector which was a reasoned order was reversed in the circumstances it was incumbent upon the State Government to have given reasons as to why it did not agree with the order passed by the Collector Agra The order is clearly arbitrary and void in law The second submission made by the learned counsel for the petitioner in our opinion is well founded

18 We consequently allow the petition, set aside the order dated 18th December, 1981 and direct that the State Government shall pass a fresh reasoned order after giving an opportunity to the petitioner to make representation in writing stating his case and the evidence which he wants to rely in support of his case The State Government will also consider the application of the petitioner for grant of lease in favour of the petitioner In the circumstances of the case, the parties are directed to bear their own costs

Petition allowed

1991 ALL L J 1028

S R SINGH J

M/s Usha International Ltd Agra and others, Petitioners v IVth Additional District Judge Bareilly and others Respondents

Civil Misc Writ Petition No 11098 of 1991 D/ 29 7 1991

(A) U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Ss 2(1), 34(1)(b) — Application for release of premises — Evidence on affidavits only — Order under Rr 1 or 2 of O 19 Civil P C is necessary pre-condition before such affidavits could be treated as evidence — However, parties having voluntarily submitted and contested by filing affidavits, absence of order under O 19, Rr 1 and 2 not fatal

1981 All LJ 809 No good law in view of AIR 1988 SC 1341

Evidence Act (1872), S 3

Evidence on affidavits — Procedure prescribed under O 19, Civil P C — Must be followed

Where in an application for release of premises, the evidence on record was in form of affidavits only, the absence of order under O 19 R 1 or 2 of Civil P C would invalidate the order passed by the Prescribed Authority S 34(1)(b) confers upon the authorities under the Rent Act in the matter of reception of affidavits in evidence for disposal of application appeal or revision as the case may be under the Act the same powers as are vested in the Civil Courts under the Civil P C Conferment of the power must carry with it the manner prescribed by Order 19 of the Code for exercise of the power therein The power and the manner of its exercise are so inseparably interwoven with and so integrally engrafted to each other that the severance of one from the other is not possible except on pains of causing injury to the statute and rendering the affidavits as no better than pleadings not amounting to evidence within the meaning of S 3 of the Evidence Act and invalidating the orders based on such affidavits

1981 All LJ 809 No good law in view of AIR 1988 SC 1341

(Para 12)

The affidavits may be treated as evidence within the meaning of S 3 of the Evidence Act either on the basis of an express order under O 19 of the Code or on the basis of an agreement between the parties which may be express or implied to get a decision on the basis of affidavits The reason prompting the observation that such agreement between the parties may be express or implied and inferred from their conduct is that the passing of an order under O 19 R 1 or 2 of the Code in

JJ F X 1090 91 AMG

cases under Rent Act is almost a formality for so far as sufficient reasons are concerned these are supplied by the object and scheme of the Act which, inter alia aims at expeditious disposal of the cases Therefore where the petitioners tenants in the instant case not only did not object to the affidavits filed on behalf of the landlady to be taken in evidence but they had voluntarily and effectively submitted to the procedure adopted by the Prescribed Authority and contested the claim of the landlady by filing affidavits with a view to rebut the affidavits filed on behalf of the landlady, the petitioners having failed to demur to the affidavits on behalf of the landlady being taken in evidence and having filed affidavit in support of their own claim shall be deemed to have acquiesced to the procedure followed by the Prescribed Authority and shall be taken to have agreed to a decision of the case on the basis of affidavits even though the Prescribed Authority may not have passed an order under O 19 of the Code calling upon the parties to file affidavits in proof of the disputed facts and issues in the case

(Para 15)

(B) Evidence Act (1872), S 68 — Will Attestation — No particular procedure prescribed — Hence fact of witnesses affixing their signature on the margin and not at the bottom of document would not invalidate such attestation

Transfer of Property Act (1882), S 3

Will — Attestation — Procedure

— The law does not provide any particular procedure for attestation of a document In the case of a Will, all that is required is that it must be attested by at least two witnesses It is not at all necessary, in order to constitute a valid attestation that the attesting witnesses must sign at the bottom of the Will In fact the attestation consists in witnessing the fact of execution of a document and if the witnesses present there, have seen the executant executing the document and in token thereof they have also signed the document, then that is a valid attestation Therefore, the fact that the attesting witnesses have affixed their signature or thumb impression on the margin and not at the bottom of the Will would not make them as marginal witnesses

(Para 18)

(C) Constitution of India Art. 226 — Writ petition — Costs — Respondent appeared by Caveat and no notices were issued — Court refrained from making any order as to costs

(Para 20)

Cases Referred Chronological	**Paras**
AIR 1988 SC 1381 (1988) 2 JT 217	13
1983 All LJ 1273 1983 ARC 752 (All)	12
1981 All LJ 809 1981 ARC 414	12
(1978) 1 Ren CJ 669 1978 (UP) RCC 299 (All)	12

Ambrish Kumar Sharma for Petitioners S C Sri S P Agarwal for Respondents

ORDER — Present petition under Art 226 of the Constitution of India is directed against the order dated 20-5 90 (Annexure 17 to the writ petition) passed by the Prescribed Authority II Addl Civil Judge Bareilly thereby releasing the premises in question in favour of respondent No 3 under S 21 of U P Urban Buildings (Regulation of Letting Rent and Eviction) Act 1972 (hereinafter called as Rent Act) and the order dated 23 3 91 (Annexure 19 to the writ petition) passed by IV Addl District Judge Bareilly thereby dismissing the appeal of the petitioners preferred against the order of the Prescribed Authority dated 28 5 90

2 The facts of the case in brief are that the premises in dispute is a shop situate at Bara Bazar Darzi Chauk in the town of Bareilly The shop is in the occupation of the petitioners on a monthly rent of Rs 135 in addition to Rs 13 50 per month as water tax One Smt Kokila Devi widow of Sri Ram Gopal Gupta resident of Khairilla street was admittedly the owner/landlady of the premises in dispute The aforesaid Smt Kokila Devi died on 27th April 1989 Smt Uma Agarwal respondent No 3 is the daughter of aforesaid Smt Kokila Devi The application under S 21 of U P Act No 13 of 1972 was filed by the respondent No 3 claiming herself to be the owner/landlady of the premises in dispute on the basis of the registered will dated 22 9 81

having been allegedly executed in her favour by Smt Kokila Devi It was alleged in the application for release of the premises that the premises in dispute was bona fide required by the landlady in order to establish her unemployed son Mahesh Agarwal who wanted to start the business of electronic goods in the shop in dispute as also to house the chamber of her Advocate husband

3 The application for release was opposed by the petitioner inter alia on the grounds that the applicant s husband was a practising lawyer well established at Allahabad and that he was not practising law at Bareilly and that the shop in question was not needed by the applicant for use by her husband and the son It was further alleged in the written statement filed on behalf of the petitioners that the applicant s family was well settled at Allahabad where her husband was established as a Practising lawyer It was further pleaded that the application for release being false, frivolous and fictitious was liable to be rejected The title of the applicant landlady was not specifically denied by the petitioners All that was said in respect of the Will was that the applicant be put to strict proof of the Will relied upon by her

4 In support of her case the respondent No 3 filed the original Will dated 22 9 81 besides some other documents and the affidavits including the affidavit of Rajendra Kumar Gupta an attesting witness of the Will, besides her own affidavit and affidavits of other witnesses of hers including those who derived benefits under the Will

5 On behalf of the petitioners, affidavit of Sri S K Jain, Commercial Manager was filed besides the affidavit of Sri Sudhir Agarwal, the Sales Representative of the petitioners and also the affidavit of one Anuj Agarwal

6 On appraisal of the Will and the affidavits filed on behalf of the parties and upon consideration of the facts and circumstances of the case, the Prescribed Authority held that the respondent No 3 became the owner landlady of the premises in dispute on the basis of the Will and that she required the premises bona fide for purposes of establishing her own son in business and also housing the chamber of her husband who is a Practising lawyer On the question of comparative hardship also the Prescribed Authority held in favour of the applicant and allowed the release application vide order dated 28 5 90 She was however directed to pay compensation amounting to Rs 3240/ calculated at the rate of 135/ per month in terms of the second proviso to S 21(1) of U P Act No XIII of 1972 The appeal preferred against the said order of eviction and release was dismissed by the learned IV Addl District Judge Bareilly vide his judgment and order dated 23 3 91 Feeling aggrieved by the aforesaid judgment and order, the petitioner tenant has approached this Court under Art 226 of the Constitution of India for a writ of certiorari quashing the same

7 I have heard Sri S S Bhatnagar Senior Counsel for the petitioner and Sri S P Agarwal appearing for the respondent No 3

8 The first contention of the learned counsel for the petitioners is that the affidavits filed in the case before the Prescribed Authority are no evidence within the meaning of S 3 of the Evidence Act 1872 and accordingly the impugned judgments are vitiated being based on no evidence inasmuch as but for the affidavits no other valid evidence was adduced by the respondent No 3 in support of her claim for release of the premises in dispute in her favour under S 21 of the Rent Act His contention is that an affidavit may be taken to be evidence within the meaning of S 3 of the Evidence Act provided that it is received in the case pursuant to an order under R 1 or R 2 of the O 19 of the Civil P C and since no such order was passed by the Prescribed Authority permitting the applicant respondent No 3 to prove facts on which she was claiming release of the premises, the affidavits were nothing but waste paper and if the affidavits are ignored then neither the Will could be said to have been proved, nor the condition precedent for release of the premises under

S 21 of the Rent Act In reply the learned counsel for the respondent contended that no such point was raised by the petitioners before the Prescribed Authority or even before the Appellate Authority nor any such specific plea or ground has been taken in the writ petition and that the petitioners shall be deemed to have acquiesced to the procedure followed by the Prescribed Authority in the case and cannot be permitted to raise such plea at the stage of argument in a petition under Art 226 of the Constitution of India.

9 A conspectus of the Rent Act would indicate that the Civil P C as such is not applicable to the proceedings under the Act By virtue of S 34 of the Act and Rule 22 of the Rules made thereunder some of the powers of the Civil Courts as specified in the section and the Rule aforesaid are vested in the Prescribed Authority or the Appellate or Revising Authority while deciding an application appeal or revision as the case may be under the Act As regards the applicability of the Evidence Act it may be noticed that there is no express provision in the Rent Act excluding the provision of the Evidence Act to proceedings under the Rent Act

10 Section 1 of the Evidence Act makes it abundantly clear that it applies to all judicial proceedings in or before any Court excepting Court Martial convened under the Army Act the Naval discipline Act etc but not to affidavits presented to any court or officer nor to proceedings before an Arbitrator The term judicial proceedings has not been defined in the Evidence Act However, according to S 2(1) of the Criminal P C 1973, the term judicial proceedings includes any proceeding in the course of which evidence is or may be legally taken on oath According to law lexicon Reprint Edition 1987 "judicial proceeding is a term used for proceeding in courts for the course authorised to be taken in various cases to secure the determination of controversy to obtain the enforcement of a right or the redress or prevention of a wrong By means of an application under S 21 of the Act, the landlord or the landlady as the case may be seeks the enforcement of his/her right to get a premises in occupation of a tenant released in his/her favour on proof of certain facts contemplated by the Section The fact that the Prescribed Authority is to decide an application under S 21 of the Rent Act according to the facts and law only after affording opportunity of hearing to the parties and not according to any policy the fact that the Prescribed Authority is empowered to take evidence on oath vide S 34 of the Rent Act and the fact that its order is appealable go a long way to indicate that the exercise of power under S 21 of the Rent Act is in the nature of judicial power and proceedings under the section are judicial proceeding S 34(2) of the Rent Act also leads me to conclude that proceedings under S 21 are judicial proceedings

11 The eviction of a tenant from the building under S 21(1) of the Act may be ordered if the Prescribed Authority is satisfied that any of the following grounds exists namely

(a) that the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family or any person for whose benefit it is held by him either for residential purposes or for purposes of any profession trade or calling, or where the landlord is the trustee of a public charitable trust for the objects of the trusts

(b) that the building is in a dilapidated condition and is required for purposes of demolition and new construction

It was not disputed before me that satisfaction of the Prescribed Authority under S 21(1) is an objective satisfaction and not a subjective one This means that the facts constituting grounds of eviction under S 21 of the Rent Act, have to be established and proved by relevant and acceptable "evidence" within the meaning of terms as defined in S 3 of the Evidence Act

12. In State of U P v Ist Addl District Judge Allahabad, reported in 1983 ARC 752 (1983 All LJ 1273) it was held by a Division Bench of this Court that proceedings under

S 21 of the Rent Act are judicial proceedings and the provisions of the Evidence Act are applicable to such proceedings That being so, affidavit cannot be treated to be evidence within the meaning of S 3 of the Evidence Act but S 34(1)(b) of the Rent Act read with provisions contained in O 19 Rr 1 and 2 of the Civil P C empowers the Prescribed Authority to decide a proceeding under S 21 of the Rent Act on the basis of affidavits The contention of Mr Bhatnagar however is that affidavit may become evidence only if it is received in evidence pursuant to an order under O 19 Rr 1 and 2 of the Civil P C and not otherwise In this connection, he has placed reliance upon a single Judge decision of this Court in Moti Lal Chhajo Lal v Additional District Judge Kanpur reported in (1978) 1 ARC 669 wherein a similar contention was raised on behalf of the petitioner of the said writ petition The learned single Judge (Hon U C Srivastava J) has made certain observations which support the contention raised by Sri Bhatnagar in the present writ petition This case was cited in M/s Kunwar Ayurvedic Pharmacy (Pvt) Ltd v 8th Addl District Judge, Kanpur reported in 1981 ARC 414 (1981 All LJ 809), but the learned Judge (Hon S D Agarwal J) observed that the question was not specifically raised in M/s Moti Lal Chhajo Lal's case and held that Legislature by virtue of clause (b) specifically contemplated that the evidence will be received in the shape of affidavit Therefore it was not necessary to specifically pass an order accepting such affidavit before it could be treated as evidence in the case I am unable to agree with the view taken by brother Agarwal, J in the aforesaid case Section 34(1)(b) confers upon the authorities under the Rent Act in the matter of reception of affidavits in evidence for disposal of application, appeal or revision as the case may be, under the Act the same powers as are vested in the Civil courts under the Civil P C Conferment of the power in my opinion, must carry with it the manner prescribed by O 19 of the Code for exercise [illegible] the other is not possible except on pains of causing injury to the statute and rendering the affidavits as no better than pleadings not amounting to evidence within the meaning of S 3 of the Evidence Act and invalidating the orders based on such affidavits Being not in agreement with the view expressed on this question in the case of M/s Kunwar Ayurvedic Pharmacy (Pvt) Ltd (supra), I would have referred the question for decision to a larger bench, but for the two Supreme Court's decisions to be referred to hereinafter

13 In Sudha Devi v M P Narain reported in AIR 1988 SC 1381 a three Judge Bench of Hon Supreme Court held that affidavits are not included in the definition of evidence in S 3 of the Evidence Act and can be used as evidence only if for sufficient reasons the court passes an order under O 19, Rr 1 and 2 of the Civil P C

14 In Khandesh Spinning & Weaving Mills v R G K Sangh, (sic) a five Judge Bench of Hon Supreme Court while examining S 118 of the Bombay Industrial Relations Act 1946, a provision similar to the one contained in S 34 of the Rent Act vis a vis the provisions of O 19 R 1 or R 2 of the Code of Civil Procedure has observed as follows

"(11) For the purpose of holding an enquiry or a proceeding under the Bombay Industrial Relations Act 1946 S 118 of the said Act confers on the Industrial Court the same powers as are vested in Courts in respect of — (a) proof of facts by affidavits (b) summoning and enforcing the attendance of any person and examining him on oath, (c) compelling the production of documents and (d) issuing commissions for the examinations of witnesses In Courts facts have to be established either by oral evidence or by documentary evidence proved in the manner prescribed by law But order XIX of the Code of Civil Procedure empowers the Court to have particular facts proved by affidavits Under Rule 1 thereof "any Court may at any time for sufficient reason order that any [illegible] as the court thinks reasonable But it is subject to the proviso that where it appears to the Court that either party bona fide desires the production of a witness for cross examination and that such witness can be produced an order shall not be made authorising the evidence of such witness to be given by affidavit Under R 2 upon any application evidence may be given by affidavit, but the Court may at the instance of either party order the attendance for cross examination of the deponent A combined effect of the relevant provisions is that ordinarily a fact has to be proved by oral evidence, but the Courts subject to the conditions laid down in O XIX may ask a particular fact or facts to be proved by affidavits Industrial Courts may conveniently follow the said procedure

The Supreme Court went on to hold further that —

> If they agree to a decision on affidavits that course may be followed But in the absence of an agreement the procedure prescribed in O XIX of the Code of Civil Procedure may usefully be followed by the tribunals so that both the parties may have full opportunity to establish their respective cases"

15 On the basis of the aforesaid authority of the Supreme Court and looking at the scheme and object of the Rent Act as also the practice in vogue of receiving affidavits in proof of disputed issues in proceedings under the Rent Act without a formal order under O 19 of the Code as of rule I am inclined to take the view that affidavits may be treated as evidence within the meaning of S 3 of the Evidence Act either on the basis of an express order under O 19 of the Code or on the basis of an agreement between the parties which may be express or implied to get a decision on the basis of affidavits The reason prompting the observation that such agreement between the parties may be express or implied and inferred from their conduct is that the passing of an order under O 19, R 1 or 2 of the Code in cases under Rent Act is almost a formality, for so far as sufficient reasons are concerned these are supplied by the object and scheme of the Act which inter alia, aims at expeditious disposal of the cases Petitioners in the instant case not only did not object to the affidavits filed on behalf of the landlady to be taken in evidence but they had voluntarily and effectively submitted to the procedure adopted by the Prescribed Authority and contested the claim of the landlady by filing affidavits with a view to rebut the affidavits filed on behalf of the landlady respondent No 3 The petitioners having failed to demur to the affidavits on behalf of the respondent No 3 being taken in evidence and having filed affidavit in support of their own claim shall be deemed to have acquiesced to the procedure followed by the Prescribed Authority and shall be taken to have agreed to a decision of the case on the basis of affidavits even though the Prescribed Authority may not have passed an order under O 19 of the Code calling upon the parties to file affidavits in proof of the disputed facts and issues in the case In the appellate court also the petitioners did not raise this plea nor any specific plea or ground in this regard has been taken by them in the writ petition The point has been advanced for the first time at the argument stage In matters of procedure and practice, as in matters of discretion I think I would be justified in refusing to interfere with the decision of the authority under the Rent Act in absence of proof of any prejudice to the petitioners for a man who does not speak where he ought shall not be heard when he desires to speak Accordingly I am not inclined to permit the petitioners under Art 226 of the Constitution to raise this plea of affidavits being inadmissible in evidence for want of an order under O 19 R 1 or R 2, C P C for the first time in this Court and that too at the agreement stage

16 The acquiescence of a party who might take advantage of an error obviates its effect (Consensus Tollit Errorem) is a well known maxim which may be pressed in to service in the case in hand If the parties allowed the authorities under the Rent Act to decide the application appeal or revision as the case may be, on the basis of such affidavit, then they are precluded from challenging the

orders on the ground that the affidavits were liable to be ignored in absence of an express order under the provisions of O 19 of the Code for an objection at appropriate stage could have avoided the irregularity or illegality in question and saved enormous time and energy of all concerned This to my mind, provides sufficient justification for refusing to interfere under Art. 226 of the Constitution with the orders impugned in the writ petition

17 The next contention urged by Sri Bhatnagar was that the Will being relied upon by the respondent No 3 was not proved in accordance with S 68 of the Evidence Act and as such, it was inadmissible in evidence His contention is that the statement of the so called attesting witness namely Sri Rajendra Kumar Gupta in his affidavit filed before the Prescribed Authority does not prove the Will within the meaning of S 68 of the Evidence Act This contention too is not acceptable It is evidence from S 1 of the Evidence Act itself that the provisions contained in the Act are not applicable to affidavits, as such the mode of proof of a Will and its exclusion from evidence in the event of the same being not proved in accordance with law as contemplated by S 68 of the Evidence Act, cannot be applied to the proof of Will through an affidavit admitted in evidence under S 34(1)(b) on the Rent Act. The Statement of Rajendra Kumar Gupta as contained in his affidavit copy of which has been annexed as Annexure 3 to the writ petition, clearly constitutes proof of the Will inasmuch as the said witness has clearly stated in his affidavit that Smt Kokila Devi executed the Will dated 22 9 81 in his presence Paragraphs 3, 4 and 6 of the affidavit of Sri Rajendra Kumar Gupta, clearly prove that Smt Kokila Devi signed the Will in his presence after fully understanding the contents of the documents The witness has further stated that he himself and the other attesting witness affixed their signatures on the Will in the presence of Smt. Kokila Devi after she had put her own signatures The Prescribed Authority has also the Appellate Authority have concurrently relied upon the affidavit of Sri Rajendra Kumar Gupta which finds support from the affidavits filed by respondent No 3 as also some of the legatees who derived the benefits under the same very Will dated 22 9 81 As such it is not possible for me to take a contrary view and hold as contended by the learned counsel for the petitioners that the execution of the Will was not proved in accordance with law

18 Sri S S Bhatnagar, learned counsel for the petitioners then contended that the Will though required by law to be attested by at least two witnesses was really not attested in accordance with law This contention of Sri Bhatnagar is based on the fact that two attesting witnesses have affixed their signatures on the Will not at the bottom of the Will but on the margin thereof According to Mr Bhatnagar, an attesting witness must affix his signatures or thumb impression, as the case may be, in token of attestation of the Will at the botton of the document and if such witnesses have affixed their signatures or thumb impression on the margin then such a witness can at best be called as Marginal Witness and not an attesting witness I find no merits in this contention of Sri Bhatnagar The law does not provide any particular procedure for attestation of a document In the case of a Will, all that is required is that it must be attested by at least two witnesses. The word attested in relation to an instrument as defined in S 3 of the Transfer Property Act means

> shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant, a personal acknowledgment of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant, but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary

The object of attestation is to ensure that there is no fraud or other vitiating circumstances in the execution of the document From the above definition it is clear that in order to constitute a valid attestation the essential conditions are (1) there must be two attesting witnesses (2) each of them must have seen the executant sign or affix his mark to the instrument and (3) each of the two attesting witnesses must have signed the instrument in the presence of the executant It is not at all necessary in order to constitute a valid attestation that the attesting witnesses must sign as contended by the learned counsel for petitioner at the bottom of the Will In fact the attestation consists in witnessing the fact of execution of a document and if the witnesses present there have seen the executant executing the document and in token thereof they have also signed the document then that is a valid attestation It is noteworthy that the petitioners have in a sense admitted the 3rd respondent as landlady by calling her as such in various paras of the writ petition Resultantly, the third contention of the learned counsel for the petitioners is also devoid of merits

19 No other points have been pressed into service by the learned counsel for the petitioners The finding recorded by the Prescribed Authority as affirmed by the Appellate Authority on the question of bona fide need and comparative hardship was not assailed before me on any ground other than the ground that the findings on these questions were based on affidavits which were inadmissible in evidence but in view of what I have dwelt upon supra, this contention cannot be sustained

20 In the result, the writ petition fails and is dismissed in limine Since the respondent No 3 appeared by caveat and no notices were issued, I refrain from making any orders as to the costs stay order dated 11 4 1991 stands discharged

Petition dismissed

1991 ALL. L J 1035

M L BHAT J

Pradeep Kumar Singh Petitioner v Vice Chancellor Allahabad University Allahabad and another Respondents

Civil Misc Writ Petition No 17527 of 1991 D 27 8-1991

Constitution of India, Arts 14, 226 — Education — Examination — Use of unfair means — Enquiry — Natural justice — Reasonable opportunity of being heard not given to student — Order debarring him from appearing in subsequent examination — Violative of principles of natural justice

Education — Examination — Use of Unfair means — Reasonable opportunity of being heard should be given to student before imposing punishment

Rules or regulations may not provide for affording an opportunity to a student charged with using unfair means during the examination but principles of natural justice require that any action which is likely to have civil consequences must be taken after hearing the person who is facing the charge or who is likely to be effected adversely by any proceeding It is implicit in every enquiry whether governed by the statute or otherwise, that a person who is facing enquiry in respect of any charge is given reasonable opportunity of being heard This requirement flows from Art 14 which guarantees equality before law for all and equal protection of law for all Therefore before imposing punishment on the petitioner for using unfair means in the examination debarring him from appearing in subsequent examination, it would be necessary to give him reasonable opportunity of being heard and to record the statement of the Chief Invigilator who had seized the answer book alleged to have been brought from outside the examination hall

(Para 6)

The unfair means committee which is clothed with the power to conduct enquiry in the matter of use of unfair means by the students during examination has a trappings of a quasi judicial tribunal which is to decide unfair means cases on evidence Such evidence is to be recorded in presence of the students who are charged with having used unfair means in the examination or misconducted themselves during the examination A student who is facing charge of use of unfair means during the examination or who is facing the charge of misconduct during the examination is entitled to be associated with the enquiry when evidence against him is recorded unless such student chooses to remain absent during the enquiry He may put questions also to the witnesses which cannot be disallowed if in the opinion of the unfair means committee such questions are relevant to arrive at a just decision of the case

(Para 5)

Shri G C Bhattacharya for Petitioner S C, for Respondents

ORDER – The petitioner has been punished for using unfair means in the examination It is alleged that petitioner while appearing in the examination of Shiksha Shastra, II paper on 27 7 1990, his answer book came from outside the examination hall He has given a show cause notice on 6-9-1990 The petitioner is said to hve replied the show cause notice on 20 11-1990 He denied the allegation The petitioner had received an order dated 1 6 1991 cancelling his BA 2nd year examination, 1990 and also debarring him from appearing in subsequent examination of 1991 by the Deputy Registrar (Examination) The petitioner challenges the order on the ground that it is passed without application of mind, mechanically and is based on no evidence The order is said to be arbitrary, unjust and unreasonable The order of punishment is also said to be against the principle of natural justice The petitioner was not given any opportunity of being heard. The petitioner was not shown the impugned answer book. On the aforesaid grounds, the petitioner seeks to quash the impugned order dated 1-6-1991

2 In reply filed by the other side it is averred that the petitioner had brought the answer book from outside the examination hall This fact is endorsed on the petitioners answer book by the Chief Invigilator of the examination centre The petitioner was given opportunity to show cause His examination was considered and thereafter his examination was cancelled

3 The impugned order of punishment is issued on the basis of show cause notice issued to the petitioner and on the basis of his reply to the said show cause notice No further enquiry was held after the petitioner s reply to the show cause notice was received The petitioner has denied the allegations levelled against him in the show cause notice If the allegation against the petitioner was proved his answer book could not be sent for evaluation to the examiner The answer book which was seized from the petitioner is said to have been brought in the examination hall from outside Therefore after its seizure it was to be treated as the disputed answer book Marks could not be awarded to the said disputed answer book It was appropriate that an enquiry in presence of the petitioner should have been held as to whether the answer book was brought from outside the examination hall and if on enquiry it was proved that the answer book was procured by the petitioner from outside the examination hall then he was liable to be punishable After denying the charge the statement of the Chief Invigilator of the examination hall who had purportedly seized the answer book after it was brought to the examination hall should have been recorded and the petitioner was entitled to cross examine the Chief Invigilator If the said invigilator was not available and could not depose during the enquiry then it was imperative for the unfairmeans committee to record such evidence as was available with them to prove the charge against the petitioner

4 The allegation levelled against the petitioner is very serious and it tends to violative the sanctity of the examination If the allegation was proved to be correct the petitioner cannot be exonerated because that would [illegible]

noted that if the allegation against the petitioner is not proved then he cannot be punished for using unfair means in the examination hall In order to prove the guilt of the petitioner it was necessary that after receipt of his reply to the show cause notice an enquiry was held to ascertain the truth or otherwise of the allegation levelled against him The allegation levelled against the petitioner cannot be wiped out unless it is enquired into The proceedings upto the stage of show cause notice and inviting reply thereto are valid Therefore these proceedings upto the stage of filing of reply to the show cause notice by the petitioner could not be wiped out The proceedings up to that stage are perfectly legal and valid and this judgment does not intended to disturb the proceedings up to the stage of filing of reply by the petitioner to the show cause notice but the later part of the proceeding by which the impugned punishment was imposed on the petitioner cannot be sustained To find out the truth it is necessary that the respondents are allowed to pick up the thread from the stage of filing of reply by the petitioner to the show cause notice and hold an enquiry in accordance with principles of natural justice against the petitioner The petitioner is required to be associated with the said enquiry and the respondents are bound to afford an opportunity of being heard to the petitioner during such enquiry It is not permissible for the respondents to punish the petitioner at this back without a proper having been conducted The enquiry against the petitioner should conform to the principles of natural justice

5 The decision after conclusion of the enquiry is likely to affect the petitioner and his civil rights are likely to be impugned therefore he must be given reasonable opportunity of being heard The unfair means committee which is clothed with the power to conduct enquiry in the matter of use of unfair means by the students during examination has a trappings of a quasi judicial tribunal which is to decide unfair means cases on evidence Such evidence is to be recorded in presence of the students who are charged with having used unfair means in the examination or misconducted themselves during the examination A student who is facing charge of use of unfair means during the examination or who is facing the cahrge of misconduct during the examination is entitled to be associated with the enquiry when evidence against him is recorded unless such students chooses to remain absent during the enquiry He may put questions also to the witnesses which cannot be disallowed if in the opinion of the unfair means comittee such questions are relevant to arrive at a just decision of the case

6 Rules or regulations of the respondents may not provide for affording an opportunity to a student charged with using unfair means during the examination but principles of natural justice require that any action which is likely to have civil consequences must be taken after hearing the person who is facing the charge or who is likely to be affected adversely by any proceeding It is implicit in every enquiry by any proceeding It is implicit in every enquiry whether governed by the statute or otherwise that a person who is facing enquiry in respect of any charge is given reasonable opportunity of being heard This requirement flows from Art 14 of the Constitution which guarantees equality before law for all and equal protection of law for all Observance of principles of natural justice is one of the attributes of Art 14 of the Constitution of India Therefore before imposing the impugned punishment on the petitioner it was necessary to give him reasonable opportunity of being heard and to record the statement of the Chief Invigilator who has allegedly seized the answer book which was brought from outside the examination hall in presence of the petitioner

7 For the reasons given in this judgment I am of the opinion that penalty imposed on the petitioner by the impugned order should be set aside with a direction that from the stage of filing of reply to the show cause notice by the petitioner, a fresh enquiry be conducted against the petitioner The penalty imposed on the petitioner alone is set aside and not the charge framed against him Therefore, the charge is to be enquired into

in accordance with principles of natural justice and in the light of the observations made hereinabove

8 The writ petition is allowed to the extent that order of imposition of penalty on the petitioner dated 1 6 1991 is set aside with a direction that the respondents if so advised may hold an enquiry into the charge levelled against the petitioner in presence of the petitioner and afford him a reasonable opportunity of being heard This shall be done within one month from the date of presentation of a certified copy of this order before the respondents by the petitioner The petitioner shall be given a certified copy of this oder within the five days on payment of usual charges In case the respondents do not choose to hold the enquiry afresh from the stage of filing of the exaplanation by the petitioner to the show cause notice within the period specified hereinabove then they shall declare the result of the petitioner and if he is successful in the examination he shall be permitted to persue his studies and take examinations also for which he is eligible

9 To the extent indicated above, the writ petition is allowed There will be no order as to costs

Petition allowed

1991 ALL. L J 1038

A N VARMA AND
R K GULATI JJ

Union of India, Petitioner v Jhansi Ram and others, Respondents

Civil Misc Writ Petition No 3693 of 1979 D/ 31 7 1991

(A) **Railways Act (9 of 1890), S 82A — Railway accident — Death of passenger — Compensation — Allegation that deceased travelling without ticket — Not proved — Railway administration liable to pay compensation**

Where the Claimant employee of Railways while travelling with his wife and children had purchased only one adult ticket under concession available to railway employees and in the railway accident the wife died and railway administration could not prove that the one ticket purchased was not for the deceased wife the wife could be said to be bona fide passenger and the Claimant husband would be entitled to compensation

(Para 5)

(B) **Railways Act (9 of 1890), S 82C(1) — Accident — Compensation — Dependent — Deceased passenger, mother of claimant, minor son — Mere relationship with deceased, brings relationship falling under category of dependent, in view of Section 2(1)(d) of W C Act (1923) — Minor son entitled to compensation**

Workmen's Compensation Act (1923), S 2(1)(d)(i)

AIR 1982 All 68, Followed

(Para 8)

(C) **Railways Act (9 of 1890), S 82C(1)(d) — Railway accident — Compensation — Dependent — Deceased passenger, wife of Claimant — Wife earning to meet expenses of family — Widower entitled to compensation being dependant, in view of S 2(1)(d)(ii) of W C Act, 1923**

Workmen's Compensation Act (1923), S 2(1)(d)(ii)(a)

(Para 10)

(D) **Constitution of India, Art 226 — Finding of fact — Railway accident — Compensation — Dependant — Finding recorded that Claimant widower depending partly on earnings of deceased wife — No error of law or jurisdiction — No interference under Art 226**

Railways Act (1890), S 82C

(Para 11)

Cases Referred Chronological	Paras
AIR 1984 Allahabad 277 (FB)	4
AIR 1982 Allahabad 68 (Followed)	9

Sri [illegible], for Petitioner, M A N [illegible], for Respondents

A N VARMA, J — This petition is directed against the order of Claims Commissioner Northern Railway Allahabad dated 23rd March 1979 allowing a claim put forward by one Jhansi Ram a Railway Employee and his minor son Dalip Kumar under the impugned order a sum of Rs 34 500/ has been awarded to Jhansi Ram and Rs 25 000/ to Dalip Kumar The compensation has been granted under Section 82A of the Indian Railways Act which provides for adjudication of claims by passengers for injuries sustained by them or by their dependents or if the passangers die in a railway accident

2 In the present case the accident took place while Jhansi Ram his wife Smt Gyan Kumari their daughter Km Gita and a minor son Raju were travelling by the Deluxe express (103Up) on 10 10 1977 from Durgawati to Allahabad In the accident Smt Gyan Kumari Geeta and Raju aforesaid all died Jhansi Ram however escaped death but sustained certain injuries The accident had taken place while the Deluxe Express was nearing Allahabad Railway Station To be precise, the accident took place at Naini as a consequence of Collision with a goods train being Up C P C Special around 0015 hours

3 After the aforesaid tragedy Jhansi Ram lodged a claim before the Ad Hoc Claims Commissioner praying for compensation under various heads on account of the injuries sustained by him as well as the death of his wife Smt Gyan Kumari Later on, Jhansi Ram made an application on behalf of his minor son Dalip Kumar as latter s guardian claiming compensation on account of the death of Smt Gyan Kumari By the impugned order both the claims have been allowed A sum of Rs 50 000/ has been awarded to be shared equally between Jhansi Ram and his son Dalip Kumar Jhansi Ram has been awarded a further sum of Rs 9,500/- on account of personal injuries sustained by him at the accident Aggrieved by the award the Railways have filed this petition

4 Against the claim of Jhansi Ram and his son Dalip Kumar several objections were raised on behalf of the Railway Administration before the Claims Commissioner It is however not necessary to elaborate here all those objections as in the course of arguments learned counsel for the petitioner has confined his submissions only to two points

First that Smt Gyan Kumari was not a bona fide passenger and consequently no compensation could be awarded on account of her death either to Jhansi Ram or Dalip Kumar In support of this contention the learned counsel placed reliance on AIR 1984 All 277 and

Second that neither Jhansi Ram nor Dalip Kumar could legally be regarded as dependents of Smt Gyan Kumari so as to entitle them to compensation under Section 82A of the Indian Railways Act

5 We shall deal with the 1st point first The facts found by the claims Commissioner are that Jhansi Ram had obtained what is called Privilege Ticket Order (described as "P T O" in short hereafter) for travelling along with his family consisting of his wife and the aforesaid two children from Allahabad to Durgawati and back Under the P T O which is a privilege allowed to the Railway Employees the railway employee proposing to travel by the Indian Railways is allowed a concession in the purchase of tickets On the strength of the P T O obtained by Jhansi Ram he obtained only one adult ticket for the journey from Allahabad to Durgawati Likewise for the journey from Durgawati to Allahabad by the ill fated train Jhansi Ram again purchased only one adult ticket The finding of the Claims Commissioner on this point is that admittedly Jhansi Ram had purchased only one adult ticket for the fateful journey The claims Commissioner however observes that there is no evidence on record to show that the ticket purchased by Jhansi Ram was for himself and not for Smt Gyan Kumari It is indisputable that the burden to prove that Smt Gyan Kumari was travelling without ticket was squarely on the Railway Administration It was, therefore for them to prove affirmatively that Smt Gyan Kumari was travelling without ticket The Commissioner has considered the state of

evidence on record, and in the absence of any positive indication that the ticket related to Jhansi Ram rightly concluded that the Railway Administration has failed to establish that Smt Gyan Kumari was travelling without ticket The submission therefore that Smt Gyan Kumari was not a bona fide passenger has no merit and must be rejected

6 As there is no evidence on the record to show that the ticket was purchased for Jhansi Ram himself and not for his wife Smt Gyan Kumari it is not necessary to comment on the other finding of the Commissioner that as Jhansi Ram was travelling on a P T O he was not required to purchase any ticket

7 That takes us to the second point urged in support of the petition In order to appreciate the contention, it would be necessary to have a look at the relevant provisions of the Statute touching the controversy Under the explanation to Section 82C of the Indian Railways Act, the word 'dependent' has been defined as having the same meaning as has been assigned to it under clause (d) of Section 2 of the Workmen's Compensation Act, 1923 Section 2 of the Workmen's Compensation Act 1923 defines the word 'dependent' as follows —

"(d) 'dependent' means any of the following relatives of a deceased workman, namely —

(i) a widow, a minor legitimate son and unmarried legitimate daughter or a widowed mother, and

(ii) If wholly dependent on the earnings of the workman at the time of his death, a son or a daughter who has attained the age of 18 years and who is infirm

(iii) If wholly or in part dependant on the earnings of the workman at the time of his death —

(a) A widower,

(b) a parent other than a widowed mother,

(c) a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or illegitimate if married and a minor or if widowed and a minor

(d) a minor brother or an unmarried sister or a widowed sister if a minor

(e) a widowed daugther in law

(f) a minor child of a pre-deceased son

(g) a minor child of a pre-deceased daughter where no parent of the child is alive, or

(h) a paternal grandparent if no parent of the workman is alive

8 A glance at the definition would indicate that in so far as a minor son is concerned he has to be deemed a dependent of the deceased without being obliged to establish that he was actually dependent for his livelihood on the deceased It is a special definition of the term 'dependent' and the legislative intention appears to be that in the case of a minor legitimate son there ought to be a presumption that he was a dependent of deceased parent Under clause 2(1)(d)(i) mere relationship with the deceased brings the relation falling under that category is sufficient to clothe him with the status of a dependent

9 Consequently, in so far as Dalip Kumar is concerned, he has to be deemed to be a dependant of Smt Gyan Kumari by reason merely of his relationship with his mother Smt Gyan Kumari We are fully fortified here by a decision of this Court reported in AIR 1982 All 68 in which a Division Bench of this Court had occasion to consider precisely this controversy There too a controversy had arisen in the context of the Railways Act, whether a minor son claiming compensation on account of death of his mother in an accident in the course of railway journey, was entitled to claim compensation as a dependent without having to establish that he was actually dependent on her Taking note of the definition of the term 'dependent' as provided in Section 2(1)(d)(i) the Bench observed that for the category of persons falling under Section 2(1)(d)(i) of the Workmen's Compensation Act mere relationship with the deceased workman, without more, was enough It was further ruled that the question whether the claimant was dependent on the [illegible]

workman arises [illegible]

clauses (ii) and (iii) of Section 2(1)(d) of the Workmen's Compensation Act. The Bench further observed that Awadhesh Kumar (one of the claimants) being a minor son of the deceased was entitled to receive the compensation and the ad hoc Claim Commissioner rightly decided so. That disposes of the controversy with regard to Dalip Kumar. He was in our opinion plainly entitled to claim compensation on account of death of his mother Smt. Gyan Kumari by reason of the simple fact of his relationship with Smt. Gyan Kumari as her minor son.

10. We next turn to the question whether Jhansi Ram could also be regarded as a dependent of Smt. Gyan Kumari. In considering this question regard shall have to be had to the definition of the word 'dependent' under Section 2(1)(d)(iii). Under this clause a widower is regarded as a dependent if he was dependent on the earnings of the deceased whether wholly or in part at the time of death of the deceased. It will thus be seen that for the success of his claim as a dependent of Smt. Gyan Kumari it was sufficient for Jhansi Ram to establish that he was dependent at least partially on the earnings of his wife Smt. Gyan Kumari. Fortunately for Jhansi Ram on this issue there is a clear and categorical finding of the Commissioner in his favour. The Commissioner has on a consideration of the evidence led by the parties concluded that Smt. Gyan Kumari was earning a sum of Rs. 100/- and was contributing to the family. The Commissioner has also observed that she used to spend her earnings in meeting the house-hold expenses of Jhansi Ram's family. Further the amount of Rs. 100/- was not an insignificant contribution considering that Jhansi Ram's own carry home pay packet was only of Rs. 298/- per month. There was thus ample evidence to sustain the finding of the Commissioner that Jhansi Ram was at least partially dependent on the earnings of his wife Smt. Gyan Kumari.

11. It must not be forgotten that the question whether the claimant was dependent wholly or in part on the earnings of the deceased is indisputably a question of fact and the finding on such an issue cannot be disturbed in these proceedings under Art. 226 of the Constitution unless it is demonstrated to be vitiated by some error of law or jurisdiction which the learned counsel for the petitioner has failed to establish.

12. In the result the petition fails and is dismissed with costs.

13. Under an interim order passed by this Court on 17-5-1979 the petitioner was directed to deposit a sum of Rs. 25,000/- out of the total amount awarded in favour of respondents 1 and 2 with the Registrar of the Court with the further direction to invest it in some interest bearing account. The petition having been dismissed the respondents 1 and 2 are entitled to get the amount of Rs. 25,000/- together with interest earned thereon. The Registrar of the Court is therefore directed to take prompt steps for ensuring that the amount is paid to respondents 1 and 2 without delay.

Petition dismissed.

1991 ALL. L. J. 1041

B. L. YADAV, J.

Gopal Prasad Mathuria, Appellant v. Smt. Angoori Devi, Respondent.

*First Appeal from Order No. 546 of 1991, D/- 17-5-1991.

Guardians and Wards Act (8 of 1890), S. 25 — Hindu Minority and Guardianship Act (32 of 1956), S. 6 — Custody of minor child — Welfare of child is a primary consideration — Re-marriage of father — Welfare of child requires custody of real mother — In spite of better financial condition, father not entitled to custody of child.

Constitution of India, Arts. 39(f) and 45.

AIR 1982 SC 792 and AIR 1984 SC 410, Rel. on.

(Paras 5 and 7)

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*Against the Judgment and order passed by Shri M. K. Mittal, J. Family Court, Agra, D/- 24-4-1991.

Cases Referred Chronological Paras

AIR 1984 SC 410 (Rel on) 7

AIR 1982 SC 792 1982 Cri LJ 580 (1981) (3) SCC 92 (Rel on) 6

Mr R N Sharma, for Appellant

JUDGMENT — This is plaintiff's First Appeal From Order directed against the order dated 24-4 1991 passed by Family Court Agra rejecting the plaintiff's application under Section 25 of the Guardians and Wards Act (for short the Act) and Section 6 of Hindu Minority and Guardianship Act

2 The factual matrix is that the appellant and respondent being husband and wife, lived together and the wife gave birth to two sons namely Rabikant and Raghubir, but now they (the wife and husband) are living separately The sons are with the mother The father appellant moved application for the custody of sons which was contested by the mother the respondent, on the ground that since the appellant has remarried Smt Munni Devi, in case the sons are given in the custody of father the sons would get stepmotherly treatment which would naturally affect welfare of the children After considering facts, circumstances of the case and evidence on record Family Court held that welfare of the children was with the mother hence the application of the husband was rejected Against this order present appeal has been filed

3 Learned counsel for the appellant urged that the welfare of the children is more in the custody of father than the mother and the appellant is in better financial position to maintain the children hence the impugned order was erroneous

4 Having heard learned counsel for the appellant, I am of the view that both the children namely Rabikant and Raghubir were aged about 12 and 10 years respectively as such minors, hence the court deciding their custody has taken their welfare as primary consideration Even the framers of the Constitution were conscious about the welfare of the children Article 15(3) enables the State to make special provisions for children and women Art 45 (forty five) provides that child up to 14 years age shall be entitled to free education Article 39(f) provides that State shall provide facilities and atmosphere to the children to develop in healthy manner These provisions reflect that the Constitution makers were conscious for safeguarding the interest of children in the country The children are very important asset of the country and the Government has evolved a national policy for the welfare of the children

5 No doubt in the present case father was in a better financial position but in view of S 25 of the Act and S 6 of Hindu Minority and Guardianship Act the Welfare of the children was supreme It is the welfare of the children which has to be kept in mind before passing an order directing custody of the children from the monther to be given to the father The allegation of the mother opposite party was that the applicant the father of the children has married with Smt Munni Devi consequently the children would facing behaviour of the step mother The Family Court has taken into consideration the welfare of the children The respondent Angoori Devi is the natural mother of the children The applicant, the father has to supervise the maintenance of the children by their step mother as alleged by the respondent There is overwhelming evidence on the record to indicate that the opposite party made application for restraining the husband from remarrying Smt Munni Devi and there appears to be some compromise but when the father remarried, the natural mother brought the children with her and was living separately with them

6 In Veena Kapoor v Varinder Kumar Kapoor, 1981 (3) SCC 92 AIR 1982 SC 792 it was held that in deciding matters concerning custody of minor children main consideration of the Court must be welfare of the children and not legal right of particular party

7 In H S Dolikuka v T C dolikuka AIR 1984 SC 410 [illegible] for consideration and there [illegible] seeking custody of [illegible]

happiness and welfare of the child but as the father was found not to encourage the child to settle down in the Boarding institution where child was continuing her studies whereas the mother was held uniformly to encourage the child to settle down in the Kimense High School their Lordships of Supreme Court ruled that father was not interested in the happiness and welfare of the child. In the present case also it is the mother who is more concerned with the welfare of the children, where the father even though in better financial position but as the children has to face the behaviour of step mother consequently welfare of the children is safe in the hands of respondent the real mother

8. Under these circumstances considering welfare of the children it is better that they are permitted to remain with the mother. The appeal accordingly lacks merit and is dismissed summarily.

Appeal dismissed

1991 ALL. L. J. 1043

S. H. A. RAZA J.

Chaman Lal Sharma, Petitioner v. The 1st Additional District Judge and others, Opposite Parties

Writ Petition No 2914 of 1989 D/- 31-7-1990

Civil P. C. (5 of 1908), O. 15, R. 5(2) — Suit for ejectment of tenant — Tenant paying arrears of rent to Counsel who failed to deposit it in Court — Ignoring representation and striking of defence not proper — For laches on part of Counsel, litigant should not be punished

Where the tenant filed a representation stating that he had given the amount to his Counsel for depositing it in Court but the Counsel did not deposit the same, dismissal of this statement on the ground that no affidavit on behalf of the said counsel was filed was not proper. If the counsel had committed breach of trust and misappropriated the amount which was given by the tenant to him, how he could ask the counsel to file his affidavit. Such a counsel would never file an affidavit as he would be held guilty of misconduct and breach of trust. A litigant should not be punished for the laches on the part of his counsel. No objection was filed against the said representation and there existed no material on the record to disbelieve the contention of the petitioner. The Court committed an error of law in ignoring the contention of the tenant that the default if any was due to the laches on the part of his counsel.

AIR 1981 SC 1657 Followed

(Para 2)

Cases Referred	Chronological	Paras
AIR 1986 All 90	1985 All CJ 375	2
1981 All LJ 82		2
1981 All LJ 908	AIR 1981 SC 1657 (Foll)	2

Avadesh Kumar, for Petitioner; A. K. Shukla, for Opposite Parties.

ORDER :— Invoking the jurisdiction of this Court under Article 226 of the Constitution of India the petitioner has prayed for the issue of a writ in the nature of certiorari quashing the order dated 14th October, 1988 contained in Annexure-3 by means of which the Additional Judge Small Causes, Lakhimpurkheri decreed the suit of the plaintiff for arrears of rent and ejectment as well as the order dated 23rd February, 1989 passed by Additional District Judge, Kheri dismissing the revision filed by the petitioner against the said order, on the ground that the trial court committed a manifest error of law by striking of the defence of the petitioner under Order 15, Rule 5 C. P. C. in spite of the fact that no objection to the representation of the petitioner was made; the trial court totally ignored to consider that the entire arrears of rent was given to the counsel who did not deposit the same in Court and hence on account of laches on the part of the counsel the Court below ought not to have rejected the representation of the petitioner; the Court below relying upon the assessment of the house in question by the Nagarmahapalaka for the year 1982-83 wrongly held that the provisions of U. P. Act No. 13 of 1972 were not applicable and the trial court wrongly held that the notice under S. 106 of the Transfer of Property Act was served upon the petition

2 As far as the first ground is concerned it has to be seen as to whether the Courts below were justified in rejecting the representation of the petitioner to the effect that he had given the arrears of rent for depositing the same to his counsel who failed to deposit the same and hence the court below committed an error apparent on the face of the record in striking out of the defence of the petitioner Hon ble Supreme Court in Bimal Chand v Gopal Agarwal AIR 1981 SC 1657 1981 All LJ 906 has indicated as under (at Page 1659 of AIR)

It seems to us on comprehensive understanding of Rule 5 of Order XV that the true construction of the Rule should be thus Sub Rule (1) obliges the defendant to deposit at or before the first hearing of the suit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and further whether or not he admits any amount to be due to deposit regularly throughout the continuation of the suit the monthly amount due within a week from the date of its accrual In the event of any default in making deposit the court may subject to the provisions of sub-rule (2) strike of his defence He shall presently come to what this means Sub rule (2) obliges the court before making an order for striking of the defence to consider any representation made by the defendant in that behalf In other words the defendant has been vested with a statutory right to make a representation to the court against his defence being struck of If a representation is made the Court must consider it on its merits, and then decide whether the defence should or should not be struck of This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occurred there is good reason for it Now it is not impossible that the record may contain such material already In that event, can it be said that sub-rule (1) obliges the court to strike of the defence ? We must remember that an order under sub-rule (1) striking of the defence is in the nature of penalty [illegible] this rests on the court [illegible] the power is not to be exercised mechanically there is a reserve of discretion vested in the court entitling it not to strike of the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so It will always be a matter for the judgment of the court to decide whether on the material before it notwithstanding the absence of a representation under sub-rule (2) the defence should or should not be struck of The word may in sub rule (1) merely vests power in the court to strike of the defence it does not oblige it to do so in every case of default To that extent we are unable to agree with the view taken by the High Court in Puran Chand 1981 All LJ 82 (supra) We are of opinion that the High Court has placed an unduly narrow construction on the provisions of clause (1) of Rule 5 of Order XV

After the aforesaid decision there are numerous cases in which this Court has taken the view that the purpose of striking out of the defence is not punitive in nature and the Court while dealing with the matter must not exercise his discretion in a way which results into injustice Only in the cases of deliberate and wilful default the Court while invoking its power under Order 15 Rule 5 C P C may strike of the defence Before taking this extreme steps the Court should look into the totality of the circumstances and exercise its jurisdiction in the judicial manner In the case of Smt Leela Devi v Smt Shanti Devi AIR 1986 Alld 90 it was indicated as under —

The provisions of Rule 5 are discretionary and not mandatory The fact that the provisions are discretionary presupposes that even if there is a default the court has to consider as to whether in a particular case it was in the interest of justice to strike of the defence For deciding whether in a particular case defence should or should not be struck of one has to consider the circumstances of that particular case On of the main circumstances which require consideration is the nature of the default If the amount of default is small or negligible considering the [illegible] view may [illegible] amount due the amount [illegible] unpaid and, therefore it cannot be ascertained as to what was the actual extent of the default Similarly another important circumstance is the nature of explanation offered for not complying with the provisions regarding deposit of the amount. If the allegation of the tenent that he failed to deposit necessary amount in the Court within time due to wrong legal advice is found correct the defence may not be struck of on this ground alone The view that as no representation was made at the time of making the deposit for condonation of delay the defence was liable to be struck of is incorrect When the relationship of landlord and tenant between the parties is questioned it was incumbent upon the Court below to decide the question of relationship before proceeding to decide the application for striking of the defence

In the instant case the petitioner has submitted a representation in which he stated that he had given the amount to his counsel for depositing the same but the counsel did not deposit the same The Courts below dismissed this plea on the ground that no affidavit on behalf of the said counsel was filed was not proper If the counsel had committed breach of trust and misapropriated the amount which was given by the petitioner to him how the petitioner could ask the counsel to file his affidavit Such a counsel would never file an affidavit, as he would be held guilty of misconduct and breach of trust. It has been the consistent view of this Court that a litigant should not be punished for the laches on the part of his counsel No objection was filed against the said representation and there existed no material on the record to disbelieve the contention of the petitioner Both the Courts have committed manifest error of law in ignoring the contention of the petitioner that the default if any was due to the laches on the part of his counsel Interest of justice required the Court to have examined the matter in the light of the decision of Hon'ble Supreme Court in the case of Bimal Chand Jain (supra)

3 As far as the two other grounds regarding the service of notice and the house in question was beyond the purview of U P Act No 13 of 1972 are concerned, the Courts below upon consideration of the evidence on record came to a definite conclusion that the notice was served and the house was construed in the year 1982 In a writ petition under Art 226 of the Constitution of India the findings of fact record by the Courts below cannot be disturbed.

4 In view of what has been indicated hereinabove this writ petition is allowed The impugned orders contained in Annexures 3 and 5 to the writ petition are quashed The Additional Civil Judge Judge Small Cause Court Lakhimpurkheri is directed to restore back S C Suit No 22 of 1986 and to decide it fresh in accordance with law and in the light of observations made above However there shall be no order as to costs

Petition allowed

1991 ALL. L. J 1045

M L BHAT J

Ajai Kumar Petitioner v University of Allahabad and others Respondents

Civil Misc Writ Petition No 21257 of 1991
D/ 27 8 1991

Constitution of India, Arts 226, 14 — Education — Examination — Use of unfair means — Student denied allegations in reply to show cause notice — Examination of student cancelled, debarring him from appearing in subsequent examination — No opportunity of being heard given — Penalty imposed liable to be set aside, but no charge framed against student — Authorities directed to conduct fresh enquiry from stage of filing reply to show-cause notice, in accordance with principles of natural justice

(Para 7)

A K Yadav for Petitioner S N Upadhyaya S C for Respondents

ORDER — The petitioner has been punished for using unfair means in the examination It is alleged that the petitioner while appearing in the examination of Shiksha Shastra, I paper on 26-7 1990 his answer book came from outside the examination hall He was given a show cause notice on 6 9 1990 The petitioner is said to have replied the show cause notice on 20-11-1990 He denied the allegation The petitioner had received an order dated 15 7 1991 cancelling his B A 2nd year examination 1990 and also debarring him from appearing in subsequent examination of 1991. by the Deputy Registrar (Examination) The petitioner challenges the order on the ground that it is passed without application of mind, mechanically and is based on no evidence The order is said to be arbitrary, unjust and unreasonable The order of punishment is also said to be against the principles of natural justice The petitioner was not given any opportunity of being heard The petitioner was not shown the impugned answer book On the aforesaid grounds the petitioner seeks to quash the impugned order dated 15-7 1991

2 In reply, filed by the other side, it is averred that the petitioner had brought the answer book from outside the examination hall This fact is endorsed on the petitioner s answer book by the Chief Invigilator of the examination centre The petitioner was given opportunity to show cause His explanation was considered and thereafter his examination was cancelled

3 The impugned order of punishment is issued on the basis of show cause notice issued to the petitioner and on the basis of his reply to the said show cause notice No further enquiry was held after the petitioner s reply to the show cause notice was received The petitioner has denied the allegations levelled against him in the show cause notice If the allegation against the petitioner was proved, his answer book could not be sent for evaluation to the examiner The answer book which was seized from the petitioner is said to have been brought in the examination hall from outside Therefore, after its seizure, it was to be treated as the disputed answer book Marks could not be awarded the said disputed answer book It was appropriate that an enquiry in presence of the petitioner should have been held as to whether the answer book was brought from outside the examination hall and if on enquiry it was proved that the answer book was procured by the petitioner from outside the examination hall then he was liable to be punished After denying the charge the statement of the Chief Invigilator of the examination hall who had purportedly seized the answer book after it was brought to the examination hall, should have been recorded and the petitioner was entitled to cross examine the Chief Invigilator If the said invigilator was not available and could not depose during the enquiry then it was imperative for the unfairmeans committee to record such evidence as was available with them to prove the charge against the petitioner

4 The allegation levelled against the petitioner is very serious and it tends to violate the sanctity of the examination If the allegation was proved to be correct the petitioner cannot be exonerated because that would amount to paying a premium to the petitioner for using unfairmeans in the examination At the same time it is to be noted that if the allegation against the petitioner is not proved then he cannot be punished for using unfairmeans in the examination hall In order to prove the guilt of the petitioner it was necessary that after receipt of his reply to the show cause notice an enquiry was held to ascertain the truth or otherwise of the allegation levelled against him The allegation levelled against the petitioner cannot be wiped out unless it is enquired into The proceeding up to the stage of show cause notice and inviting reply thereto are valid Therefore these proceedings up to the stage of filing of reply to the show cause notice by the petitioner could not be wiped out The proceedings up to that stage are perfectly legal and valid and this judgment does not intend to disturb the proceeding up to the stage of filing of reply by the petitioner to the show cause notice but the later part of the proceeding by which the impugned punishment was imposed on the petitioner cannot be sustained. To find out the truth it is necessary that the respondents are allowed to pick up the thread from the stage of filing of reply by the petitioner to the show cause notice and hold an enquiry in accordance with principles of natural justice against the petitioner The petitioner is required to be

associated with the said enquiry and the respondents are bound to afford an opportunity of being heard to the petitioner during such enquiry It is not permissible for the respondents to punish the petitioner at his back without a proper enquiry having been conducted The enquiry against the petitioner should conform to the principles of natural justice

5 The decision after conclusion of the enquiry is likely to affect the petitioner and his civil rights are likely to be impugned therefore he must be given reasonable opportunity of being heard The unfairmeans committee which is clothed with the power to conduct enquiry in the matter of use of unfairmeans by the students during examination has a trappings of a quasi judicial tribunal which is to decide unfairmeans cases on evidence Such evidence is to be recorded in presence of the students who are charged with having used unfairmeans in the examination or misconducted themselves during the examination A student who is facing charge of use of unfairmeans during the examination or who is facing the charge of misconduct during the examination is entitled to be associated with the enquiry when evidence against him is recorded unless such student chooses to remain absent witnesses which cannot be disallowed if in the petition of the unfairmeans committee such questions are relevant to arrive at a just decision of the case

6 Rules or regulations of the respondents may not provide for affording an opportunity to a student charged with using unfairmeans during the examination but principles of natural justice require that any action which is likely to have civil consequences must be taken after hearing the person who is facing the charge or who is likely to be affected adversely by any proceeding It is implicit in every enquiry whether governed by the statute or otherwise that a person who is facing enquiry in respect of any charge is given reasonable opportunity of being herad. This requirement flows from Art. 14 of the Constitution which guarantees quality before law for all and equal protection of law for all Observance of principles of natural justice is one of the attributes of Art 14 of the Constitution of India Therefore before imposing the impugned punishment on the petitioner it was necessary to give him reasonable opportunity of being heard and to record the statement of the Chief Invigilator who has allegedly seized the answer book which was brought from outside the examination hall in presence of the petitioner

7 For the reasons given in this judgment I am of the opinion that penalty imposed on the petitioner by the impugned order should be set aside with a direction that from the stage of filing of reply to the show cause notice by the petitioner a fresh enquiry be conducted against the petitioner The penalty imposed on the petitioner alone is set aside and not the charge framed against him Therefore the charge is to be enquired into in accordance with principles of natural justice and in the light of the observations made herein above

8 The writ petition is allowed to the extent that order of imposition of penalty on the petitioner dated 15-7 1991 is set aside with a direction that the respondent if so advised may hold an enquiry into the charge levelled against the petitioner in presence of the petitioner and afford him a reasonable opportunity of being heard This shall be done within one month from the date of presentation of certified copy of this order before the respondents by the petitioner The petitioner shall be given a certified copy of this order within five days on payment of usual charges In case the respondents do not chose to hold the enquiry afresh from the stage of filing of the explanation by the petitioner to the show cause notice within the period specified herein above then they shall declare the result of the petitioner and if he is successful in the examination he shall be permitted to pursue his studies and take examinations also for which he is eligible

9 To the extent indicated above, the writ petition is allowed There will be no order as to costs

Order accordingly

1991 ALL L J 1048

V K KHANNA AND
R R K TRIVEDI JJ

Zila Parishad, Bijnor and another, Appellants v Mukhtiar Ahmad Respondent

F A F O No 531 of 1991 D/ 20 8 1991

U.P Kshettra Samitis and Zilla Parishads Adhiniyam (33 of 1961), Ss 33, 51(i), 143 and 202, Sch II, Part A — Auction of license — Cancellation — Validity — Auction not subject to approval by Collector — Cancellation by Collector without opportunity of being heard given to highest bidder — It was arbitrary and violative of principles of natural justice

Constitution of India, Arts 14 and 226

Sale of Goods Act (3 of 1930), S 64

where an auction of a Licence to collect carcasses was held by Zilla Parishad with the prior permission of the Collector and the auction was not subject to approval by the Collector, the subsequent cancellation and reauction of license by the Collector without opportunity of being heard given to the highest bidder was arbitrary and violative of principles of natural justice There were directives from the State Govt to give preference to the societies of members who were traditionally engaged into the business of collection of carcasses For the previous year the licenses were settled with such societies but the societies had committed default in making the payment and hence the societies were not entitled to any preference Cancellation of auction for this reason was thus not justified On the fall of the hammer on the highest bid being accepted the contract stand concluded There was nothing to show any default on the part of the bidder he had complied with all the conditions which were necessary for participating in the auction A right accrued in his favour and this right could not be taken away without giving him an opportunity of hearing For this reason also the direction for reauction of the licence to collect carcasses was wholly illegal arbitrary and void being violative of principles of natural justice

AIR 1989 All 64 Rel on

1991, Vol I UPLBEC 608 Distinguished

(Paras 6, 7 and 8)

Cases Referred	Chronological Paras
1991 (1) UPLBEC 608 (All) (Disting)	8
AIR 1989 Alld 64 (Rel on) (1989) 15 All LR (R) 42	7

Mr B D Mandhyan for Appellants Mr R H Zaidi for Respondent

R R K TRIVEDI, J — In both these appeals Shri R H Zaidi has put in appearance for respondents Counter and rejoinder affidavits have been exchanged and learned counsel for the appellants Sri B D Mandhyan and Sri R H Zaidi are agreed that both the appeals may be decided finally at this stage In both the appeals, common question of law and fact are involved and they can be conveniently decided by a common judgment

2 The facts, in brief giving rise of the F A F O No 531 of 1991, are that the Zila Parishad Bijnor made an advertisement in local newspaper inviting interested persons to participate in open auction for obtaining licence to collect carcasses of the dead animal and to extract hides and bones therefrom. the licence was to be granted blockwise for the year 1991 92 Initially the auction was scheduled for the date 27th March, 1991 but it was postponed for 1st April 1991 The auction took place and the bid of Sri Mukhtiar Ahmad respondent for Rs 3,00 100/ was found highest in respect of Mohammadpur Deomal block The bid was accepted and respondent Mukhtiar Ahmad deposited Rs 75 000/ immediately after acceptance of the bid as being highest and the rest of the money was to be deposited by him within three days from the date of auction However, on 2nd April 1991, another notice was published that the auction shall be again held on 3rd April 1991 under the orders of the Collector/Adhyaksh Zila Parishad, Bijnor The respondent on 3rd April, 1991 made an attempt to deposit the rest of the amount of

his bid but it was not accepted Aggrieved Mukhtiar Ahmad filed Original Suit No 74 of 1991 and prayed that the defendant appellant be restrained from reauctioning the licence for collecting carcasses of the dead animals and hides and bones in respect of Mohammadpur Deomah block for which his bid of Rs 3.00 100/ has already been accepted. It was also prayed that the appellant be directed to accept the amount of Rs 2 25,100/ which he has always been prepared to deposit and is still prepared to deposit In this suit an application for grant of temporary injunction was also moved which after hearing both the parties was allowed vide order dt 3rd June 1991 by learned VI Additional District Judge Bijnor Aggrieved by the aforesaid order of temporary injunction this appeal has been filed by the appellants

3 The facts giving rise to the F A F O No 532 of 1991 are also identical Only difference is that in this case the bid of Sri Abdul Salam respondent in respect of 10 Nyay Panchayats of Haldaur for the year 1991 92 was accepted being highest for Rs 2,31 000/ Respondent Abdul Salam deposited Rs 80,000/ immediately with the fall of the hammer and the rest of the amount was to be deposited within three days from the date of the auction Rest of the facts are identical and as the reauction of the aforesaid licence was notified for 3rd April, 1991 Abdul Salam has also filed Original Suit No 174 of 1991 for identical relief The application (Paper No 7 C) for grant of temporary injunction was moved by Abdul Salam The said application has also been allowed by order dt 3rd June, 1991 aggrieved by which the present appeal has been filed by Zila Parishad, Bijnor

4 We have heard Sri B D Madhyan, learned counsel for the appellants in both the appeals and Sri R H Zaidi learned counsel for the respondents Sri B D Mandhyan also made available to us the original record pertaining to the aforesaid auction We have perused extensively original record

5 It will not be out of place to mention here, in brief, that the disputes regarding the auction and right to collect carcasses of the dead animals and the hides and bones came up before this Court as well as before Hon ble Supreme Court Hon ble Supreme Court directed the State Government to frame model by laws regulating auction of the rights in such a manner so that the interest of persons traditionally engaged in collecting such materials may not be effected and they may not be exploited by middle men In pursuance of the various orders and directions issued by Hon ble Supreme Court in this connection State Government issued several orders directing Zila Parishads to allot the licence to the co-operative societies consisting of members of poor communities who are traditionally engaged in this trade In case such societies are available the contract should not be put to general auction but should be settled only with such societies Parties are not at dispute so far the aforesaid position is concerned. In case the co-operative societies consisting of persons traditionally engaged in such trade were available the licence cannot be auctioned by Zila Parishad in favour of respondents

6 However the perusal of the original record tells a different story in both the appeals It is necessary to give a narration of facts found from record which shall clarify the position In respect of the year 1990-91 the licence to collect carcesses of the dead animal was settled with two co operative societies namely Pashu Shav Chhedan Evam Haddi Coora Udhyog Sahkari Samiti Kaziwala and another co-operative society of the same name of village Ganj Block Halduar district Bijnor The licence was settled in their favour for the amount of Rs 2 42 075 00 and Rs 1 70 507 00 in respect of two blocks However societies committed default and for the aforesaid financial year amounts of Rs 1 59 355 80 P and of Rs 1 03 373 20 P remained unpaid Both the societies committed default Mukhya Adhikari submitted a detailed report in this connection before the Collector/Adhyaksh Zila Parishad on 23rd March 1991 There is nothing that after talks Collector Bijnor directed to persuade the aforesaid co-operative societies to clear the arrears However, it appears that the co-operative

societies did not deposit the aforesaid amount Further an enquiry was made and it was found that the members of the aforesaid societies were not the persons belonging to the communicaties traditionally engaged in such trade hence they were not legally entitled to be given any preference as per Government orders It was in these circumstances that the right to collect carcasses and the hides and bones was put to open auction on 1st April, 1991 It appears that all papers were then placed before Collector, Bijnor who orally disapproved the auction held on 1 4-1991 There is noting that after talks with the Collector, Bijnor he has directed to reauction the licence tomorrow at 10 30 a m and proceedings for reauction should be taken in the office of Zila Parishad No reason has been assigned for passing this order There is no order in writing, it was only an oral direction given by the Collector It is not clear from the record that the said co-operative societies cleared the dues relating to the financial year 1990 91 or that the order against them that the members do not belong to the community traditionally engaged in such trade was set aside or withdrawn by any authority Sri B D Mandhyan during arguments failed to produce any order in writing passed by Collector, Bijnor directing reauction. It is also clear from the record that no opportunity or notice was given to the respondents for not sticking to the auction dt 1st April 1991 in which their bids being highest, were accepted and acted upon The crucial date for determining the propriety of the order is 2nd April, 1991 when the reauction was directed by Collector, Bijnor From the perusal of the record pertaining to auction and the documents filed We do not find any legal justification for directing reauction Assuming for the sake of arguments that the societies consist of the persons (which too was decided much after 2-4-1991) belonging to the community traditionally engaged in such business, there is nothing on record to show that the default committed by them in previous year was, in any way, cleared It was in full knowledge of the Collector, Bijnor that the societies have committed default so far as the previous year amount is concerned Efforts were made to persuade the societies to deposit the amount as directed by him but till 1st April, 1991 the amounts were not deposited The auction on 1st April 1991 was held with the permission of Collector, Bijnor It was not justified on his part to go back from the auction in this manner We have no hesitation in saying that the auction of the appellants was most arbitrary and unreasonable

7 The another aspect of the problem is that on the fall of the hammer on the highest bid being accepted the contract stood concluded There is nothing to show any default on the part of the respondents They complied with all the conditions which were necessary for participating in the auction A right accrued in their favour and this right cannot be taken away without giving them an opportunity of hearing For this reason also the action of the appellants directing reauction of the licence to collect carcasses is wholly illegal, arbitrary and void being violative of principles of natural justice A Division Bench of this Court in the case of Zila Parishad Muzaffarnagar v Udai Veer Singh, reported in AIR 1989 All p 64, has held that under S 64 of Sale of Goods Act the auction sale completes by fall of hammer It has been further observed in para 36 that " Public bodies conducting public auctions will lose their credibility and the conduct of public auction might lead to endless litigations when they will be upset without cause though held profitably, regularly and without defeat An auction which has been regularly conducted strictly as desired by a public body or government with no illegality having been pointed out and is at a monetary advantage over the previous year, must be finalised This Court cannot permit an auction in which no illegality has been pointed out to be abandoned merely because officials do not act when they should have acted or chose to act when it was too late to act The aforesaid division bench is squarely applicable in the facts of the present case

8 Sri B D Mandhyan, learned counsel for the appellants, relied on certain

Government Orders which contained directions to give preference to the co-operative societies consisting of such persons who were traditionally engaged in such trade. There is no dispute that the direction of the State Government is binding on the Zila Parishad and normally the Zila Parishad ought to have settled the licence with the co-operative societies and should not have given it by public auction. Sri Mandhyan relied on a Division Bench decision of this Court in the case of Gramin Charan Utpadan Sahkari Samiti Ltd. District Etawah v. Zila Parishad reported in 1991 Vol. I U.P.L.B.E.C. p. 668. we have already stated that the licence to collect carcasses and hides and bones should have been settled with the co-operative societies as per directions of the State Government but it is not disputed that the two co-operative societies which were given licences in the previous year have committed default in paying substantial amount and thus they disentitled themselves for preference which normally should have gone to them under the Government Orders. The facts of the case relied on by Sri Mandhyan are clearly distinguishable and it cannot be applied in the facts of the present case. The Government Orders, contained no direction that Zila Parishad should settled their licence with the co-operative societies which have not paid the amount due from them. The orders can not be given such meaning or literal application so as to cause loss to Zila Parishad. The authorities in such circumstances should reconcile the situation could legally refuse to give preference to such societies which may be detrimental to the interest of Zila Parishad.

9. We put a question that arguments to Sri B. D. Mandhyan to show as to how the approval of the auction held on 1st April, 1991 was necessary in this case by Adhykash/Collector, Bijnor. However, Sri Mandhyan failed to invite our attention to any such reservation kept in the terms and conditions to which the auction was made subject, or to any by laws or rule making such approval obligating. Sri Mandhyan relied on the provisions of S. 33 of U.P. Kshetra Samiti and Zila Parishad Adhiniyam and also placed reliance in part A of Schedule II and S. 31 r/w S. 143 and S. 202. We have considered the provisions and in our opinion none of the aforesaid provisions provide it as a matter of condition that every auction shall be subject to the approval of the Adhyaksh, Zila Parishad. In fact we strongly feel that the Collector who functioned as Adhyaksh, Zila Parishad at relevant time acted in arbitrary manner in unsetting the auction held on 1st April 1991 without passing any reasoned order and without giving any opportunity to the persons concerned. Such action cannot be and should not be approved.

10. We have perused the orders impugned in both the appeals and we do not find any error on which basis an interference may be said to be necessary by this Court. The appeals have no force.

11. For the reasons recorded above, both appeals are dismissed. However, there will be no order as to costs.

Appeals dismissed.

1991 ALL. L.J. 1051

V. K. KHANNA AND
G. P. MATHUR JJ

Amar Singh Rathor, Petitioner v. District Magistrate, Fatehpur, Respondents.

Civil Misc. Writ Petition No. 10883 of 1991, D/- 23-4-1991.

U.P. Co-operative Societies Act (11 of 1966), S. 130 — U.P. Co-operative Societies Rules (1968), Rr. 464, 465 — Removal of Chairman — Motion of no-confidence — Meeting for consideration of no-confidence motion — Could not be convened on scheduled date — "Specified Authority" is empowered to postpone the meeting.

(Para 5)

Mr. A. Kumar, for Petitioner; Standing Counsel, for Respondents.

ORDER — The petitioner was elected as Chairman of the Committee of

Management of Fatehpur Zila Sahkari Bank Ltd Fatehpur, which is a Co operative Society registered under the provisions of the U P Co operative Societies Act, 1965 Some members of the committee of management of the Bank gave notice of motion of no-confidence against the petitioner under Rule 456 of the U P Co operative Societies Rules (hereinafter referred to as the Rules) to the District Magistrate, Fatehpur who is the 'Specified Authority' as defined in Rule 465 of the Rules The District Magistrate, Fatehpur, by his order dated 22 1 1991 fixed 26 2 1991 as the date for holding a meeting for the purpose of consideration of the proposed no confidence motion and nominated the S D O Bindki, to act as the Presiding Officer of the meeting However before the meeting scheduled for 26 2 1991 could be convened, the District Magistrate passed another order on 25 2 1991 by which it was directed that the meeting shall be convened on 2 4 1991 The present writ petition has been filed for question of the aforesaid order dated 25 2 1991 passed by the District Magistrate, Fatehpur

2 Learned counsel for the petitioner has submitted that the provision of U P Co-operative Societies Act and the Rules made thereunder do not confer any power on the Specified Authority to postpone and fix another date for holding the meeting for the purpose of consideration of the proposed no confidence motion According to the learned counsel for the petitioner, the Specified Authority can exercise the power conferred by Rules 438 and 459 only once and once that power is exercised he becomes functus officio and cannot perform any other act with regard to fixing a date for convening the meeting or for nominating any Gazetted Government Servant

3 We have considered the submissions made by the learned counsel for the petitioner and in our opinion the contention advanced by the learned counsel is wholly unfounded Part VIII of U P Co-operative Societies Rules lays down the procedure for removal of a Chairman or Vice Chairman by a vote of no confidence A perusal of Rules 455 to 465 will show that the rules do not impose any such bar on exercise of power by the Specified Authority to postpone a meeting for the purpose of consideration of no confidence motion The only bar which Rule 464 lays down is that, if the motion of no confidence fails for want of quorum or lack of requisite majority at the meeting, no subsequent meeting for considering a no confidence motion shall be held within six months of the date of the previous meeting Sub-rule (2) of Rule 459 lays down the quorum for such a meeting and Rule 460 provides that the resolution for no confidence shall be deemed to be carried if passed by a majority of two thirds of the members present However, the stage for ascertaining as to whether there was a requisite quorum or whether the resolution of no confidence has been carried or not will arrive only after the meeting has actually been convened and a Gazetted Government Servant is present as the Presiding Officer of the meeting In case the legislature intended to lay down that the Specified Authority could exercise the power of fixing time date and place of the meeting as contemplated by Rule 458 only once, it would have said so by making a provision to that effect In the absence of any specific provision in the Rules we are unable to hold that the Specified Authority becomes functus officio after having once exercised the power conferred by sub rule (1) of Rule 458 of the Rules

4 In this connection the following statement of law in Shackleton on the Law and Practice of Meetings ' Seventh Edition, by Ian Shearman, page 79, relating to Adjournment by the Chairman may be noticed which is as follows —

'The only instance where the chairman has the right to adjourn the meeting are as follows --

1 a power of adjournment is often vested in the chairman by the regulations of the body under whose auspices the meeting is held

2 The chairman may adjourn on his own authority, in order to facilitate the business in the meeting, e g to take a poll

3 In the case of persistent disorder, the chairman is empowered to adjourn the meeting, sometimes a short adjournment — for say 15 minutes — has the desired effect

It is therefore, well settled that the power of adjournment is vested in the Chairman subject to any restriction that may be imposed upon him by custom or in the case of registered bodies by regulations of those bodies

5 The District Magistrate has clearly mentioned in his order dated 25 2 1991 that due to certain unavoidable circumstances the meeting scheduled for 26 2 1991 shall be held on 2 4 1991 In our opinion in order to give effect to the intention of the legislature and the provisions of the Rules relating to motion of no confidence against any functionary of a co operative society a power to adjourn the meeting must be deemed to be vested with the authority There may be situations where it may not be possible to convene a meeting on the scheduled date There may be riots which may warrant imposition of curfew or there may be some calamity due to which it may not be possible to hold the meeting on the date fixed for the said purpose In such a situation it may be absolutely imperative to postpone the meeting fixed for the purpose of consideration of the proposed no-confidence motion If it is held that the Specified Authority has no power to postpone the meeting once fixed it will lead to disastrous results A Chairman or Vice Chairman against whom notice of no confidence motion has been given may himself create such a situation that the meeting as originally fixed may not be held and in that event the whole exercise as provided in Rules 456 to 458 will have to be gone into again This can never be the intention of he legislature

6 We are clearly of the view that the Specified Authority has ample power under the provisions of the Act and the Rules to postpone the meeting and fix another date for the purpose of consideration of the proposed no-confidence motion In our opinion that is no merit in the submissions made by the learned counsel for the petitioner The writ petition is dismissed in limine

Petition dismissed

1991 ALL. L. J. 1053

S D AGARWALA AND
BIRENDRA DIKSHIT JJ

Misri Lal and others Petitioners v State of U P and others, Respondents

Civil Misc Writ Petition No 15391 of 1987 D/ 29 4 1991

(A) U P Slum Areas (Improvement and Clearance) Act (1962), S 3 — Declaration as 'slum area' — Opportunity of hearing to property-owners in that area — Necessary

Constitution of India, Art. 226

(Para 3)

(B) U P Slum Areas (Improvement and Clearance) Act (1962), Ss 3, 17 — Acquisition of property — Only declaration as 'slum area' made under S 3 — No acquisition under S 17 — Title of owner continues over disputed property — he cannot be deprived of disputed property

Constitution of India, Art 300A.

(Para 4)

Cases Referred	**Chronological Paras**
1988 All LJ 599 W P No 5991 of 1984 D/ 2 2 1984 (All)	3

A C Nagam for Petitioner S C for Respondents

B DIKSHIT, J — The petitioners have raised grievance by this writ petition that despite the fact that House No 106/262(1) Jeevan Lal Ka Ahata, Gandhinagar Kanpur (hereinafter referred to as disputed property) of which they are owners in possession, has not been validly declared as Slum area under S 3 of U P Slum Areas (Improvement and Clearance) Act 1962 (hereinafter referred to as the Act), the representatives of Kanpur Development Authority were compelling petitioners and their tenants to deposit down payment under the 'Hire Purchase Scheme of said authority and to get lease deed executed in respect of said property without acquiring the same The grievance arose as the Kanpur Development Authority was accepting down payment under 'Hire

Purchase Scheme one such person being Ghaseete from whom payment was received without acquiring disputed property The petitioners also drew attention of respondent No 3 Competent Authority but he simply gave assurance to the effect that petitioners need not worry as their houses were not in any acquisition proceedings As the Competent Athority did not take any action in spite of repeated written and oral requests while Kanpur Development Authority and the persons from whom down payments were accepted by Kanpur Development Authority were interfering in possession of the petitioners over the said premises and they were also using force hence the present petition was filed on apprehension that petitioners will lose their property on account of high handedness and malafide action of Kanpur Development Authority

2 We have heard the learned counsel for the petitioners and the learned counsel for the respondents Learned Counsel for the petitioners has contended that the declaration under S 3 of the Act in respect of the property in dispute dated 29 3 1984 was wholly invalid as no opportunity of being heard was given to the petitioners before making such a declaration The petitioners have further contended that in any case even if declaration under S 3 of the Act was a valid declaration then too since no Notification has been issued under S 17 of the Act acquiring the land in dispute, the petitioners continue to be the owners of the property in dispute and the respondent has no jurisdiction whatsoever to interfere with the possession of the property of the petitioners or with his proprietary rights in respect of the property in dispute

3 In regard to the first submission the petitioners have specifically stated in the writ petition that they were not provided any opportunity of hearing before issue of a declaration under S 3 of the Act as a Slum Area In Writ Petition No 5991 of 1984 Rudra Prasad Bajpai v Commissioner Allahabad Division Allahabad, decided on 2 2 1984 (1988 All LJ 399) a Division Bench of this Court has held that an opportunity was necessary before issuing of a declaration under S 3 of the Act We agree with the view taken by the Division Bench of this Court The first submission made by the learned counsel for the petitioner is well founded

4 In regard to the second submission also the submission made on behalf of the petitioners is correct S 3 of the Act empowers Competent Authority constituted under the Act to declare a particular area to be 'Slum Area under prescribed condition On declaration of any area as Slum area, the State Government has power to acquire any land or building in slum area in accordance with the procedure prescribed under Chapter V of the Act The acquisition under Chapter V of the Act can be made under prescribed conditions any by following procedure laid down under S 17 of the Act S 18 of the Act provides that where any land or building has been acquired under the Act, the State Government shall make it available to the Competent Authority for the purposes of executing any work of improvement or for carrying out order of demolition or for the purpose of re development or re habilitation of slum area or for any other purpose of the Act and thereupon the Competent Authroity has been empowered to utilise the land or building so made available for the said purpose S 19 of the Act provides that every person whose land or building or any interest therein has been acquired under the provisions of the Act shall be entitled to, and be paid compensation by the State Government in accordance with the provisions of the Act in the manner prescribed S 20 of the Act provides, procedure for determination of compensation in respect of any land or building acquired under the Act The scheme under the Act does not deprive the petitioners of their proprietary right over disputed property by declaration under S 3 of the Act The only mode provided for on owner of his proprietary rights is by acquisition of disputed property under S 17 of the Act As respondents did not take recourse to acquisition under S 17 of the Act the title of the petitioners continues over disputed property The respondents did not have any power due to want of title over disputed property to compel petitioners or their tenants to deposit down payments under the

Hire Purchase Scheme with Kanpur Development Authority or for getting lease deed of disputed property executed In the absence of any proceedings for acquisition the petitioners continue to be owner of disputed property and in view of Constitutional protection under Article 300A of the Constitution the petitioner cannot be deprived of disputed property save by authority of law and the respondent s property save by authority of law and the respondents cannot interfere in their right of ownership and possession unless the disputed property is acquired by the respondents

5 For the reasons assigned above the writ petition is allowed and the declaration under S 3 of the Act dated 29 3 1984 in respect of house and land bearing Municipal No 106/262(1) Jeevan Lal Ka Ahata Gandhi Nagar Kanpur is quashed and the respondents their officers and staff and all other persons claiming under them are restrained from interfering in petitioners ownership rights and possession over said property It is clarified that it is open to respondents to take action afresh in accordance with the Act and to declare disputed property as Slum area and to acquire the land and the building if it is considered necessary There will be no order as to costs

Petition allowed

1991 ALL L J 1055

(SUPREME COURT)

(From Allahabad)

N M KASLIWAL AND G N RAY, JJ

Civil Appeal No 728 of 1980, D/-1-11-1991

Mansoor Ali Khan and others, Appellants v State of U P and others, Respondents

U P Imposition of Ceiling on Land Holdings Act (1 of 1960), S 31(2) (as amended by U P Act No 20 of 1976) — Ceiling — Redetermination — Proceeding initiated within two years from 10-10-1975 — No notice under S 9(2) issued to legal heirs of deceased tenure holder — Jurisdiction to redetermine not affected — Redetermination however, invalid for want of opportunity of being heard to legal heirs

Civil Misc Writ No 2855 of 1977, (All), **Reversed** (Para 3)

Cases Referred Chronological	Paras
1979 All LJ 1174 1979 All LR 564 AIR 1980 NOC 6 (FB)	2

G N RAY, J — In this appeal by grant of special leave the appellants four in number, being sons of late Shri Wadood Ali Khan have challenged the legality, validity and propriety of redetermination of ceiling of lands of the said Wadood Ali Khan under the Uttar Pradesh Imposition of Ceiling on Land Holdings Act 1960 (hereinafter referred to as the Ceiling Act) The relevant facts of the case of the appellants in this appeal are as follows —

(a) The appellants are four sons and legal representatives of late Shri Wadood Ali Khan who had died on 20-8-1974 It is contended that in addition to the appellants the said Wadood Ali Khan had left the other heirs and legal representatives, namely, three sons — Maskhur Ashud Khan, Mobdud Ali Khan and Mashkoor Ali Khan widow Smt Firdaus Begum and daughters Shabana Begum, Farzana Begum and Qaiser Jahan Begum

(b) That after the death of Wadood Ali Khan, the Prescribed Authority under the Ceiling Act served a notice under S 10 of the Ceiling Act proposing to declare lands to the extent of 178-15-19 bighas of irrigated land as surplus Such notice under S 10 was served on appellant No 1 although the notice was addressed to the deceased Wadood Ali Khan

(c) Appellant No 1 filed objections before the Prescribed Authority and also participated in the proceedings for determination of ceiling Such proceeding was decided by the Prescribed Authority by its judgment dated 29th April, 1975, inter alia, partly upholding objections of the appellant and declaring 87-1-19-19 bighas of irrigated lands as surplus and treating the late Wadood Ali Khan as the tenure holder

(d) The appellants filed an appeal before the learned Civil Judge against the aforesaid decision of the Prescribed Authority and it is stated in the appeal petition that such appeal was pending

(e) The Ceiling Act was amended from time to time and in 1976 the Ceiling Act was further amended by the U P Act No 20 of 1976 Such Amending Act received the assent of the President on 30th April 1976 and was published in the U P Gazette extraordinary dated 3rd May, 1976 Various changes in different Sections of the Ceiling Act were introduced by the said U P Act, 1976 S 31(3) of the said U P Act 20 of 1976 provides as follows

31 (3) Where an order determining surplus land in relation to a tenure holder has been made under the principal Act before the tenth day of October, 1975, the Prescribed Authority (as defined in the principal Act) may, at any time within a period of two years from the said date, redetermine the surplus land in accordance with the principal act as amended by this Act, whether or not any appeal was filed against such order and notwithstanding any appeal (whether pending or decided) against the original order or determination of surplus land

(f) The Prescribed Authority issued a notice to the appellant No 1 on 8th July, 1976 under S 10(2) of the Act inter alia holding that 199-1-1 bighas of irrigated lands were proposed to be declared surplus The appellants filed objections to the proposed action of redetermination of ceiling by raising various objections The Prescribed Authority thereafter disposed of the proceeding of redetermination of ceiling by order dated 22nd December, 1976 to the effect that 125-3-8-16 bighas of irrigated lands belonging to the said Wadood Ali Khan were surplus which were owned by Wadood Ali Khan as tenure holder on the appointed day

(g) The appellants preferred an appeal in the Court of District Judge, Saharanpur, against such order dated 22nd December, 1976, but such appeal was dismissed by the learned Additional District Judge by Judgment and Order dated 16th May, 1977 The appellants thereafter moved a Writ Petition in the Allahabad High Court being Civil Misc Writ 2955/77 which was disposed of by Order dated 29th November, 1976 (sic)

(h) The writ petitions moved by the appellants were disposed of by the Allahabad High Court inter alia to the effect that previous determination of surplus land by the Prescribed Authority did not operate as res judicata and the appellate authority was justified in ignoring the Sale Deed dated October 27, 1971 The High Court of Allahabad, however, held inter alia that the determination about some plots of lands had not been properly made Accordingly, the case was remanded to the appellate authority with the direction to the appellate authority to issue notice to the other brothers of the appellants

2 Mr Satish Chandra, learned senior counsel appearing for the appellants, has strongly contended at the hearing of this appeal that such redetermination could only be made under the provisions of the Act as amended by U P Act No 20 of 1976 in view of the fact that the intention of the proceedings for redetermination was made after the said Act 20 of 1976 was enforced He has also contended that the notice under S 10(2) was deliberately issued to the appellants by ignoring the other heirs of late Wadood Ali Khan although the concerned Prescribed Authority was aware that the said Wadood Ali Khan had died in 1974 He has also contended that the notice under S 10(2) was purported to have been issued under the Amending Act of 1975 although the Amending Act of 1976 had come into force Mr Satish Chandra has also contended that if the Prescribed Authority had prima facie come to the finding that the lands indicated in the notice under S 10(2) were surplus lands, it was his bounden duty to serve notices on all the heirs of Wadood Ali Khan and initiation of any proceeding without such notices to all the heirs was void In support of this contention, he has relied upon a Full Bench decision of the Allahabad High Court made in the case of Shantha Kumar v State of Uttar Pradesh, 1979 All LR 564 (1979 All LJ 1174) Mr Satish Chandra has also contended that service of proper notice under S 9(2) of the Ceiling Act on all the heirs

of late Wadood Ali Khan was essential for assuming jurisdiction to redetermine the ceiling lands Admittedly when such notice had not been issued to all the co-sharers no proceeding for redetermination could have been lawfully initiated Therefore the adjudication made by the Prescribed Authority and consequential adjudication by the appellate authority and the Allahabad High Court must be held to be illegal void and without jurisdiction He has contended that since two years elapsed from the enforcement of the said Act 20 of 1976, no fresh redetermination is permissible in law at present He has also contended that the purported initiation of the proceedings for redetermination of ceiling on lands and order passed by the Prescribed Authority and the consequential orders passed by the appellate authority and by the High Court of Allahabad on the writ petitions mentioned hereinbefore must be quashed

3 We are, however, not inclined to accept the contention of Mr Satish Chandra that the proceeding for redetermination of ceiling land could not have been initiated by the Prescribed Authority until Notice under S 9(2) was issued by him to all the heirs and he could only assume jurisdiction for initiation of a proceeding for redetermination of ceiling land after serving such notices to all the heirs of late Wadood Ali Khan S 31(3) of U P Act 20 of 1976, in our view, authorises the Prescribed Authority to redetermine the surplus land in relation to the tenure holder if initiated within two years from October 10, 1975 Admittedly, the previous determination of ceiling was made before tenth of October, 1975 Accordingly, under sub-sec (3) of S 31 of the said U P Act 20 of 1976, the Prescribed Authority had jurisdiction to initiate the said proceeding and such jurisdiction did not depend on issuance of notice under S 9(2) of the Ceiling Act to the tenure holder and/or the successors-in-interest of the tenure holder It, however, appears to us that although the Prescribed Authority had jurisdiction to initiate the proceeding for redetermination of surplus land and he had in fact initiated such proceeding within two years as referred to in sub-sec (3) of S 31 of U P Act 20 of 1976, such determination could not have been made without affording to the heirs and legal representatives of Wadood Ali Khan an opportunity of being heard and showing cause before the Prescribed Authority Admittedly, Wadood Ali Khan had died in 1974 and the said fact was made known to the Prescribed Authority when the initial determination of surplus lands was made It is unfortunate that in spite of the said fact, the Prescribed Authority failed and neglected to ascertain the names of all the legal heirs and representatives of Wadood Ali Khan and did not issue notices to such heirs for redetermination of surplus land The High Court of Allahabad has directed to issue notice to other brothers of Wadood Ali Khan The High Court has also remanded the case to the appellate authority so that other brothers get opportunity to appear and make submissions The High Court has, however, not directed to issue notices to other heirs and legal representatives Moreover in our view without giving other heirs and legal representatives an opportunity of being heard, adjudication of the case on merits by the concerned authorities or by the High Court was not warranted In the aforesaid facts, we dispose of this appeal by setting aside the order passed by the Prescribed Authority on 22nd December, 1976 and the impugned appellate orders passed by the learned Additional District Judge on 26th May, 1976 and also the impugned decision of Allahabad High Court in Writ Petition No 2955/77 Mr Satish Chandra has contended that in view of subsequent changes of the Ceiling Act by the Amending Act 20 of 1976, there is no surplus land liable to be vested in the State of Uttar Pradesh It is not necessary to express any opinion on such contention of Mr Satish Chandra in view of the fact that the Prescribed Authority will have to redetermine the case of surplus land on the basis of existing provisions of the Ceiling Act applicable on the relevant date and the parties will get opportunity to make appropriate submissions on fact and law The Prescribed Authority is directed to issue notices to all the heirs and legal representatives of late Wadood Ali Khan including the appellants herein and the other heirs and legal representatives referred to in this judgment

The Prescribed Authority will decide the question of surplus land in accordance with the provisions of the Ceiling Act after issuing such notices to the heirs and legal representatives of late Wadood Ali Khan and giving such heirs and legal representatives a reasonable opportunity of being heard In order to avoid any difficulty and any attempt to delay the disposal of redetermination of surplus land by the appellants or the other heirs of Wadood Ali Khan, it is directed that if there has been any change in the survivorship of legal representatives of late Wadood Ali Khan or devolution of interest of such heirs by lapse of time the appellants should inform the Prescribed Authority within a month from today the names and other particulars including the addresses of all such heirs and legal representatives of late Wadood Ali Khan so that appropriate notices may be issued by the Prescribed Authority If the names and particulars of the legal representatives are not furnished within a month from today by the appellants to the Prescribed Authority in terms of this direction, liberty is given to the Prescribed Authority to serve the notices to the appellants and to the other heirs mentioned in this judgment by sending such notices under the care of the appellant No 1, Mansoor Ali Khan, Village Kailashpur Pargana Haraura, Tehsil and P O Saharanpur U P and it will be deemed that he is representing the interest of other heirs and legal representatives The Prescribed Authority is directed to dispose of the proceeding for redetermination of surplus land as early as possible in view of the fact that the matter is pending determination for long In the facts of the case, there will be no order as to costs

Appeal allowed

1991 ALL L J 1058

B P JEEVAN REDDY C J AND
S R SINGH J

Jogendra Singh Petitioner v State of Bank of India Manipuri and another, Respondents

Civil Misc Writ No 5294 of 1988 D/ 14 5 1991

(A) **Constitution of India, Art 246 — Competency of state legislature to legislate — Determination — Ascertainment therefor, of entry to which enactment relates — Doctrine of pith and substance has to be employed — Enactment relating to entry in List 2 on application of doctrine — Incidental trenching on field reserved for Parliament by list 1 of Sch seven — Enactment does not become incompetent**

While examining to which Entry does an enactment relate, it is necessary to examine the pith and substance of the enactment What is to be ascertained is what is the central theme of the enactment It may happen that an enactment made by the State Legislature and which applying the doctrine of pith and substance is found relatable to an Entry in List II may incidentally trench upon the field reserved for Parliament by List I, but on that account the said enactment cannot be declared as incompetent

(Para 9)

(B) **U P Agricultural Credit Act (19 of 1973), S 11 — S 11 is intra vires state legislature — Act is one relating to agriculture as also to land and relief of agricultural Indebtedness — Same is, relatable to Entries 14, 18 and 20 of List 2 of Sch. 7 of Constitution and perhaps to Entry 20 in List 3 — Definitely not relatable to Entry 45 in List 1, i e, 'Banking'**

Constitution of India, Art 246, Sch 7, List 1, Entry 45, List 2, Entries 14, 18 and 20, List 3, Entry 20

The main object underlying the enactment is to provide for agricultural credit through banks and also to provide for its recovery To induce the banks to provide credit to agriculturists for agricultural purposes it was also necessary to provide an easy and convenient method for their recovery If the banks were asked to advance credit and in case it was not repaid, they were to file suit in civil court, which drags on for years and years the banks would not have come forward or agreed to advance credit to agriculturists Section 11 providing for convenient method of recovery of loan is thus an integral part of the scheme contained in the enactment It is perfectly within the competence of the State Legislature, since it is clearly relatable to Entries in the State List and cannot, by any stretch of imagination, be relatable to Entry 45 of List I Banking' The central theme of the enactment is not to regulate banking or to make a law relating to banks It is a law relating to agriculture as also to land relief of agriculture indebtedness It is thus relatable to Entries 14, 18 and 30 of List II It may also be relatable, perhaps to Entry 20 in List III (Concurrent List) as a measure of economic and social planning But by no stretch imagination can it be treated as a law relating to 'Banking

Cases Referred Chronological	**Paras**
AIR 1981 Madras 318	2, 4
1980 All LJ 950 AIR 1980 SC 1955	9
AIR 1978 SC 215 (1978) 1 SCR 641	9
AIR 1976 SC 1031 (1976) 1 SCR 552	9
1972 Tax LR 449 AIR 1972 SC 1061	9

H M Srivastava, for Petitioner, S C, for Respondent

JEEVAN REDDY, C J — The Uttar Pradesh Legislature enacted U P Agricultural Credit Act, 1973 ' to make provisions to facilitate adequate flow of credit for agricultural production and development through banks and other institutional credit agencies and for matters connected therewith or incidental thereto ' It was brought into force with effect from 1 1 1974 *Section* 2 of the Act defines certain expressions Section 3 empowers the State Government to vest, subject to such restrictions as may be specified in the notification, all bhumidhars, asamis and Government lessees, with rights of alienation in land (held under their tenure or any interest held by them in such land) including the right to create a charge or mortgage on such land or interest in favour of banks for the purpose of obtaining financial assistance Section 6 provides that an agriculturist desirous of securing financial assistance from any bank by creating a charge on land or any immovable property may make a declaration on a duly stamped paper in the form set out in the schedule to the Act Chapter IV of the Act provides for recovery of dues by banks Section 11 in particular provides that not with standing anything contained in any law for the time being in force, an officer specified by the State Government may on an application by the bank by order direct that any amount due to the bank on account of financial assistance given to agriculturists be recovered by sale of the land or of any interest therein or other immovable property which is charged or mortgaged towards the loan amount It is not necessary for us to go into other provisions in as much as we are concerned in this writ petition only with the validity of Section 11 For the sake of convenience, Section 11 may be set out in its entirety It reads —

' 11 Recovery of dues of a Bank through a prescribed authority — (1) Notwithstanding anything contained in any law for the time being in force, an officer specified by the State Government by notification in the Gazette (here in after referred to as the prescribed authority) may on the application of a bank by order direct that any amount due to the bank on account of financial assistance given to an agriculturist be paid by the sale of the land or any interest there in or other immovable property which is charged or mortgaged for the payment of such amount

Provided that no order of sale shall be made under this subsection unless the agriculturist has been served with a notice by the prescribed authority calling upon him to pay the amount due

(1A) The provisions of the Limitation Act, 1963, shall apply in relation to an application under subsection (1), as if such application were a suit in civil court for sale of the land or interest there in or other movable property for enforcing recovery of the sum referred to in that sub section.

(2) An order passed by the prescribed authority shall subject to the result of appeal under Section 12 be final and be binding on the parties.

(3) Every order passed by the prescribed authority in terms of sub section (1) or by the appellate authority under Section 12 shall be deemed to be a decree of civil court and shall be executed in the same manner as a decree of such court having jurisdiction.

(4) No suit for the recovery of any sum due to a bank on account of financial assistance given to an agriculturist shall lie in the civil court.

2. The learned counsel for the petitioner Sri H M Srivastava raised a legal contention at the hearing of the writ petition though not taken in the writ petition. He submitted on the basis of a decision of the Madras High Court in G N Venkataswamy v Tamil Nadu Small Industries Corporation Ltd AIR 1981 Madras 318 that Section 11 is ultra vires the State Legislature and hence no recovery can be made in accordance with Section 11. Before we proceed to deal with this contention, it would be appropriate to briefly state the facts of the writ petition.

3. The petitioner is an agriculturist. He took a loan from the first respondent State Bank of India Manipuri in the sum of Rs 65,000/ in the year 1981 for purchasing a tractor. The loan was repayable in certain specified instalments within a period of seven years. The petitioner says that he paid certain amounts. But, admittedly he did not pay the instalments as stipulated whereupon the bank sent a recovery certificate to the second respondent Tahsildar Bhongaon District Manipuri to recover an amount of Rs 1,18,611.80 p plus interest and collection charges. On the basis of the said certificate the Tehsildar proceeded to recover the amount as arrears of land revenue. It is against these recovery proceedings that the present writ petition was filed. The recovery proceedings were stayed by this Court by an order dated 17-3-1988 on the condition of the petitioner depositing a sum of Rs 25,000/ within two weeks from the date of the order.

4. The contention of the learned counsel is that is a law relating to banking can be made only by the parliament in as much as banking is one of the subjects in the Union List (List I) of the Seventh Schedule to the Constitution. The State Legislature has no power to make a law relating to banking. Section 11 of the U P Act is a law relating to banking in as much as it provides for and deals with recovery and mode of recovery of the debts due to banks. strong reliance is placed upon the Bench judgment of the Madras High Court in G N Vankataswamy (supra) wherein Section 52A of the Tamil Nadu Revenue Recovery Act was declared as ultra vires the powers of the State Legislature.

5. For a proper appreciation of this contention it is necessary to notice a few Entries in the Seventh Schedule to the Constitution.

6. Entry 45 of List I (Union List) reads, 45 Banking.

7. Entry 14 of List II (State List) reads, 14 Agriculture including agricultural education and research, protection against pests and prevention of plant diseases. Entry 18 of List II reads 18 Land that is to say rights in or over land land tenures including the relation of landlord and tenant, and the collection of rents transfer and alienation of agricultural land land improvement and agricultural loans colonization. Entry 30 in List II relates to relief of agricultural indebtedness. It reads, 30 Money landing and money lenders relief of indebtedness. Entry 45 of List II pertains to land revenue. It reads 45 Land revenue including the assessment and collection of revenue, the maintenance of land records survey for revenue purposes and records of rights, and alienation of revenues.

8. Entry 20 of List III (Concurrent List) reads, 20 Economic and social planning. Entry 33 of List III, which was substituted by

the Constitution (Third Amendment) Act 1954 reads "33 Trade and commerce in and the production supply and distribution of —

(a) the products of any industry where the control of such industry by the Union is declared by parliament by law to be expedient in the public interest and imported goods of the same kind as such products

(b) food stuffs including edible oil seeds and oils

(c) Cattle fodder including oilcakes and other concentrates.

(d) raw cotton whether ginned or unginned, and cotton seed and

(e) raw jute

9 It is well settled that while examining to which Entry does an enactment relate it is necessary to examine the pith and substance of the enactment We have to ascertain what is the central theme of the enactment It may happen that an enactment made by the State Legislature and which applying the doctrine of pith and Substance is found relatable to an Entry in List II, may incidentally trench upon the field reserved for parliament by List I but on that account, the said enactment cannot be declared as incompetent While it is unnecessary to refer to the several decisions on the subject, it would be enough if we refer to the decision of the Constitution Bench of the Supreme Court in Ishwari Khetan Sugar Mills v State of U P AIR 1980 SC 1955 (1980 All LJ 950) It says (at Page 1964) —

12 When validity of a legislation is challenged on the ground of want of legislative competence and it becomes necessary to ascertain to which entry in the three lists the legislation is referable to the Court has evolved the theory of pith and substance If the pith and substance of a legislation falls within one entry or the other but some portion of the subject matter of the legislation incidentally trenches upon and might enter a field under another List, the Act as a whole would be valid not with standing such incidental trenching This is well established by a catena of decisions (see Union of India v H S Dhillon (1972) 2 SCR 33 AIR 1972 SC 1061 (1972 Tax LR 442) and Kerala State Electricity Board v Indian Aluminium Co Ltd (1976) 1 SCR 552 AIR 1976 SC 1031 After referring to these decisions in State of Karnataka v Ranganatha Reddy, (1978) 1 SCR 641 AIR 1978 SC 215 Untwalia, J speaking for the Constitution Bench has in terms stated that the pith and substance of the Act has to be looked into and an incidental trespass would not invalidate the law The challenge in that case was to the nationalisation of contract carriages by the Karnataka State inter alia on the ground that the statute was invalid as it was a legislation on the subject of inter State trade and commerce Repelling this contention the Court unanimously held that in pith and substance the impugned legislation was for acquisition of contract carriages and not an Act which deals with inter State trade and commerce

10 Bearing the said principle in mind, let us examine whether the U P Agricultural Credit Act is outside the competence of the Legislature of Uttar Pradesh We have already referred to the purpose for which the said enactment was made The main purpose was to enable the agriculturists to create a charge upon their lands or to mortgage them in favour of banks for raising loans for developing their agriculture For this purpose, a right was created in the several tenure-holders to charge or mortgage their lands in favour of banks, a simple and convenient procedure was also evolved for the said purpose The main idea was to save the agriculturists from the clutches of unscrupulous money lenders who have been grabbing their lands under the guise of recovery of loans and to provide for a steady flow of agricultural credit through banks Interest charged by banks is far lower than interest charged by money lenders and there is always an openness in all dealings with banks As part of the scheme the Act also provides for recovery of loans given by banks to agriculturists for agricultural purposes S 2 defines the expressions agriculture' agricultural purpose and agriculturist The Act also provides for financing of agricultural co operative credit societies by banks with the same object Can it be said this is a law

relating to Banking ? We think, not The central theme of the enactment is not to regulate banking or to make a law relating to banks It is a law relating to agriculture as also to land and relief of agriculture indebtedness It is thus relatable to Entries 14 18 and 30 of List II It may also be relatable, perhaps to Entry 20 in List III (Concurrent List) as a measure of economic and social planning But by no stretch imagination can it be treated as a law relating to Banking ' No doubt, the Act provides for recovery of loans advanced by banks But is does not deal with recovery of all loans given by banks It only provides for recovery of agricultural loans advanced by banks to agriculturists To reiterate, the main object underlying the enactment is to provide for agricultural credit through banks and also to provide for its recovery To induce the banks to provide credit to agriculturists for agricultural purposes, it was also necessary to provide an easy and convenient method for their recovery If the banks were asked to advance credit and in case it was not repaid, they were to file suit in civil court, which drags on for years and years, the banks would not have come forward or agreed to advance credit to agriculturists Section 13 is thus an integral part of the scheme contained in the enactment It is perfectly within the competence of the State Legislature, since it is clearly relatable to Entries in the State List and cannot, by any stretch of imagination, be relatable to Entry 45 of List I Banking

11 We shall now examine the decision of the Madras High Court, upon which strong reliance is placed by the learned Counsel for the petitioner S 52A of the Tamil Nadu Revenue Recovery Act provided for recovery of loans and advances to any person (i) by Tamil Nadu Agro Industries Corporation Ltd., Madras, or (ii) by such other Corporations (the shares of which have been contributed, under written or guaranteed by the State Government) as may be notified in this behalf by the State Government in the Tamil Nadu Government Gazette, as arrears of land revenue It would be appropriate to set out the said provision It reads

52A Recovery of sums due to the Tamil Nadu Agro Industries Corporation and other Corporations etc — Without prejudice to any other mode of recovery which is being taken or may be taken All loans granted and all advances made to any person —

(i) by the Tamil Nadu Agro Industries Corporation Limited, Madras or

(ii) by such other Corporations (the shares of which have been contributed, under written or guaranteed by the State Government) as may be notified in this behalf by the State Government in the Tamil Nadu Government Gazette, or

(iii) from out of the Amalgamated Tamil Nadu shares of the post War Services Reconstructions Fund and the Special Fund for Reconstruction and Rehabilitation of Ex servicemen, together with interest on such loans and advances, and all sums due to the Corporations mentioned in clauses (i) and (ii) may be recovered in the same manner as arrears of land revenue under the provisions of this Act '

It appears that the Government of Tamil Nadu had from time to time issued notifications, notifying the Corporations such as the State Industries promotion Corporation of Tamil Nadu Ltd Tamil Nadu Small Industries Development Corporation Ltd , The Tamil Nadu Industrial Investment Corporation Ltd and so on as Corporation within the meaning of S 52A(ii) The petitioner before the Madras High Court had taken a loan from Tamil Nadu Small Industries Development Corporation Ltd Which he failed to repay, where upon proceedings were taken under S 52A for recovering the same as arrears of land revenue The petitioner approached the Madras High Court by way of a writ petition questioning the validity of the said provision on the ground that it is outside the competence of the Madras Legislature to enact. The petitioner's contention was that S 52A is not relatable to any of the Entries in List II or List III and, therefore, outside the province of the State Legislature According to the petitioner, the said provision was relatable to entry 45 in List I The respondent Corporation, however.

sought to relate the said provision to Entries 3 43 and 45 of List II of the Seventh Schedule Entries 3 43 and 45 of List II read as follows —

3 Officers and servants of the High Court procedure in rent and revenue courts fees taken in all courts the Supreme Court

45 Public debt of the State

45 Land revenue including the assessment and collection of revenue the maintenance of land records survey for revenue purposes and records of rights and alineation of revenues

The Division Bench examined the three Entries and held that the impugned provision cannot be related to any of them The Bench confined its attention to S 52A and held that it cannot be related to any of the three entries in the List II relied upon for the Corporation The conclusion of the Bench is to be found in paragraph 46 of its judgment It runs as follows —

"46 the conclusion is inescapable that entry 45 of List II of the Seventh Schedule to the Constitution of India only deals with land revenue payable to the State and it has nothing whatever to do with any amount payable by any person to anybody else Therefore prima facie the State Legislature, under the said Entry, will have no power to enact a law for the purpose of collecting the dues owned by a person to a Corporation like the Corporations with which we are concerned and from this point of view S 52A of the Act, as introduced by the Tamil Nadu Act 12 of 1972, will be outside the legislative competence of the State

It is indeed not necessary for us to express any opinion on the correctness or otherwise of the said decision for the reason that the Madras High Court was not dealing with either agricultural credit or with relief of agricultural indebtedness, where as the Uttar Pradesh Act in question deals exclusively with flow of agricultural credit through banks and recovery of loans advance by banks for agricultural purposes It does not also appear that the attention of the Madras High Court was invited to Entry 20 in the Concurrent List, which relates to economic and social planning S 52A of the Tamil Nadu Act was sought to be justified as a law relating to Entries 3 43 and 45 of the State List and particularly with reference to Entry 45 which deals with land revenue including assessment and collection of land revenue " The Court held that it cannot be so related It is evident that the U P Act is by its very character theme and purpose wholly distinguishable and different from the provision of the Tamil Nadu Revenue Recovery Act considered by the Madars High Court The said decision has therefore, no application to the U P Act or S 11 thereof

For the above reasons we reject the contention that S 11 of the U P Agricultural Credit Act, 1973 is ultra vires the Legislature of Uttar Pradesh

12 No other point was urged except a plea for facility of payment The bank too has no objection to fixation of appropriate instalments Accordingly we direct that the entire amount due and payable as on 1 6 1991 shall be paid in four equal quarterly instalments commencing with 1-6 1991 The first instalment shall be payable on or before 1 6 1991 and the remaining three on 1 9-1991 1 12 1991 and 1 3 1991 respectively If any one of these instalments is not paid as specified here in the entire amount shall become payable at once and can be recovered in accordance with law

13 It shall be open to the petitioner to approach the Bank for furnishing him with a statement of account as on 1 6 1991 He may approach the Bank for this purpose within three weeks from today and if he does so, the Bank shall furnish a statement to him within two weeks therefrom

14 The writ petition is accordingly dismissed subject to fixation of the instalments in the foregoing paragraph by us There shall be no order as to costs

Petition dismissed

1991 ALL L J 1064

N N MITHAL AND G D DUBE JJ

Adhishashi Abhiyanta Sharda Sahyak Khand, Azamgarh and another Appellants v Sheo Dass and others Respondents

First Appeal No 615 of 1989 D/ 29 4 1991*

Limitation Act (36 of 1963), S 5 — Appeal — Delay in filing — Condonation — State Government allege that delay was on account of lawyer's strike — However, absence of statement that Chief Standing Counsel or Standing Counsel was also on strike — Registry open during strike — Failure to show that every step was taken to advance prosecution case — Failure by State Government to explain delay — Delay cannot be condoned

Civil P C (5 of 1908), S 96

Case law discussed

(Paras 11, 12, 14)

Cases Referred Chronological	**Paras**
(1991) FA No 613 of 1989 D/ 29 4 1991 (Allahabad) State of U P v Surendra Nath	10
(1991) FA No 710 of 1989 D/ 7 3 1991 (Allahabad) State of U P v Phota	10
AIR 1988 SC 897	10
AIR 1987 SC 1353	10
(1987) 2 All Rent Cas 300 1987 supp SCC 685	10
AIR 1983 SC 845 1983 All WC 766	10
AIR 1978 SC 537	10
AIR 1962 SC 361	10
AIR 1916 Nagpur 39	10

M S Negi Chief Standing Counsel for Appellants

G D DUBE, J — An application has been moved under S 5 of the Indian Limitation Act for condoning the delay of 68 days in filing the appeal

2 The impugned order was passed on 25th March 1989 Notice for readiness of copy was posted on the Notice board on 25th May 1989 Copy was delivered on the same day to the applicant The appeal was filed on 20 9 1989 with a court fee stamp of Rs 10/ only There was a deficiency of Rs 53,422 90 The Stamp reporter had reported on 19 9 1989 that by that day it was beyond time by 67 days Thus on 20 9 1989 the appeal was beyond time by 68 days The deficiency in the court fee was made good on 15th November 1989

3 The applicant has alleged in the affidavit accompanying the S 5 application that after the judgment had been pronounced the Collector instructed the District Government Counsel and paid expenses for obtaining the certified copy of the judgment The District Government counsel applied for copy on 5 5 1989 After receiving copy the Collector sent the judgment to State Government for issuing instructions for filing appeal The State Government issued instructions on 22nd July, 1989 The said instructions were received in the office of Collector on 28th July 1989 It has been alleged that Rajnath clerk of the office of Special Land Acquisition, Officer proceeded to Allahabad on 2nd August 1989 with a copy of judgment and made inquiries from the office of Standing Counsel regarding the payment of Court fee and other expenses in the aforesaid appeal This clerk was informed about the expenses and court fee and returned back next day for obtaining expenses The clerk came to know that there was strike in the High Court after 10th August 1989 and as such he was advised to come to Allahabad only on 21st August, 1989 when the strike was likely to come to an end It was also urged that the High Court was closed due to strike and as such appeal could not be filed It was alleged that the appeal could not be filed due to administrative reason

4 The respondent contested this application alleging that there was a

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*Against judgment and decree of Sri Sachchidanand Shukla, 2nd Addl Dist Judge Azamgarh, D/ 25 3 1989

JI/KI/A1025/91/HK/VNP

negligence on the part of the administration from the very begining The administration applied for copy of the judgment after one and half month They have not disclosed as to when the papers were sent to State Government when the copies were obtained on 25 5 1989 The State Government was also negligent in issuing the instruction on 22 7 1989 when the limitation was only upto 15th July 1989 They denied that the strike had any effect on institution of the appeal The registry was open during the strike and the lawyers were free to do their chember work It was alleged that the excuse of the state counsel that they could not file the appeal due to strike was incorrect

5 After the affidavit has been exchanged we heard the counsel for the parties After going through the file we noticed that the stamps were purchased on different dates between 3 11 1989 to 7 11 1989 even though it was alleged that the whole expenses had been made available to the Chief Standing Counsel s office on 21st August 1989 Consequently the Chief Standing Counsel was afforded an opportunity to explain the above anomaly by filing a supplementary affidavit

6 Ravi Prakash an assistant, of the office of Chief Standing Counsel filed his affidavit stating that official of Special Land Acquisition Officer Azamgarh came to Allahabad on 21 1 1989 and handed over a Bank Draft of Rs 1 16 000/ The Accountant deposited the Bank Draft in State Bank of India The dealing assistant of the First Appeal Section of the Chief Standing Counsel submitted voucher of court fee stamp of Rs 10/ to file the First Appeal on 19 9 1989 Consequently he has supplied the said court fee stamp The appeal clerk had submitted another voucher of Rs 53 422 50 to make good the deficiency Ravi Prakash stated that when he received such voucher he submitted the cheque and voucher to the Treasury Officer for transfer credit for obtaining stamps from Treasury Office He purchased the stamps of petty amounts from the stamp venders of High Court Allahabad It was stated that stamp of amount of Rs 300/ was purchased from the stamp vendor of the High Court on 6 11 1989 and were kept in the office for supply on demand He stated that there was no slackness on the part of the accountant Ravi Prakash in supplying the different court fee stamp in the case

7 As against the affidavit of Ravi Prakash, Brij Nath Singh has filed a supplementary counter affidavit He reiterated the fact stated in his first counter affidavit He also stated that when the Accountant keeps the court fee stamps in his cash box and purchased them from the local stamp venders also then there was nojustification in filing the appeal with a court fee stamp of Rs 10/ only It was urged that there was a gross-negligence on the part of the clerk concerned dealing appeal in not demanding the full stamps on the date of filing the appeal

8 Ravi Prakash and Rajendra Nath had filed another supplementary rejoinder affidavit explaining the reasons for supply of Court fee stamp purchased on different dates He says that court fees stamps purchased by him are being kept in his cash box Whenever required by the dealing assistant he supply the court fee stamp from his box It has been stated that Rang Bahadur, upper division assistant has required the court fee stamp and he has supplied them He stated that in another case he purchased stamp worth Rs 7 50 000/ from the treasury. Court fee stamps of Rs 25 000/ denomination were left in his box which he had supplied to the dealing assistant

9 Rang Bahadur has also stated that since money was received through draft hence on 21 8 89 only a court fee stamp Rs 10/ was affixed When the appeal was listed before this Bench for hearing the deficiency was made good within the time allowed

10 We have heard the learned counsel for the parties In F A No 613 of 1989 State of U P v Surendra in which judgment has been delivered today We have discussed the cases of Ram Lal v Rewa Coal Field, AIR 1962 SC 361, Kedarnath v Zumberlal, AIR 1016 Nagpur 39 State of U P v Bahadur Singh 1983 All WC 766 L (AIR 1983 SC 845)

Bhag Singh v. Major Daljit Singh (1987) 2 All Rent Cas 300 (SC); Collector, Land Acquisition v. Mst. Katiji AIR 1987 SC 1353 and also the judgment of Division Bench of this Court in F. A. No. 710 of 1989 State of U. P. v. Phool along with three other cases decided on 7th March 1991 in which that Division Bench had noticed the cases of G. Ramegowda v. S. L. A. O. Banglore AIR 1988 SC 897 and Mrs. Sandhya Rani Sarkar v. Smt. Sudha Rani AIR 1978 SC 537. After considering all these cases we have summarised the legal position as it emerged from the decision considered by us in the following words:—

(i) State and the private individual both stand on the same footing and should be treated alike. In the case of the State however while construing the cause shown the court should be alive to the impersonal nature of State machinery loaded as it is with inherited bureaucratic methodology inspired with note making, file pushing and passing on the buck ethos. Thus some delay may be inevitable and this should receive a more liberal consideration and is not to be viewed in a pedantic manner.

(ii) Approach in considering the cause shown should be such which would advance cause of substantial justice rather than throttle it.

(iii) The party which seeks condonation must also bear the burden of showing that despite all necessary steps being taken to file the appeal within time it failed due to cause beyond its control. There must be absence of negligence or inaction and also no lack of bonafide should be attributable to it.

(iv) Only on crossing these hurdles can an application for condonation succeed. However, each case deserves to be decided on its own facts and circumstances and no straight jacket formula can be prescribed."

11. In this case the appellants had several opportunities to explain the delay. Despite pointing out by the respondents about the omission to explain the delay as to when the papers were sent to the State Law Department for permission to file appeal, no attempt has been made to disclose this date so far. It was necessary for the State Government to have placed [illegible] material on record on the basis of which it could come to the conclusion that even though in the State machinery several hands and desks are involved yet every step had been taken to advance the prosecution of the case. The State Government has concealed the material facts for the purposes of this case.

12. It has not been stated by any one of the deponents filing affidavit on behalf of the State that the Chief Standing Counsel or the Standing Counsel working in the High Court was also on strike during the strike of the High Court. If the Chief Standing Counsel or the Standing Counsel was not on strike, then there was no justification to wait for the end of the strike of the lawyers. The Registry was open even during strike. The Chief Standing Counsel or the Standing Counsel under his instructions could present the appeal in the Registry. Hence the explanation of the State that the appeal could not be filed on account of strike is not worthy of acceptance.

13. It is strange that even though the money had been placed at the disposal of the office of the Chief Standing Counsel on 21.8.1989 the appeal was presented with a deficiency of court fee of Rs. 10/- and this deficiency was made good after more than two and a half months. The statement of Ravi Prakash discloses that he keeps a stock of court fee stamps in his cash box and supplies them as and when a demand is made by the clerk concerned. In such a circumstance, the appeal could have been filed with full court fee on the date of presentation by placing a demand of the full court fee. No satisfactory explanation has been given as to why Rang Bahadur head placed a demand of court fee of Rs. 10/- only when the amount of full court fee had been placed at the disposal of the office of Chief Standing Counsel.

14. Considering the above facts, we find that the State Government has failed to explain the delay. The application under Section 5 of the Indian Limitation Act is rejected. Consequently, the memo of appeals is also rejected.

Appeals dismissed.

1991 ALL L J 1067

(SUPREME COURT)

RANGANATH MISRA C J I, M H KANIA AND KULDIP SINGH JJ

Writ Petn (Civil) No 1345 of 1989 (With W P (Civil) Nos 1110 of 1989, 869 of 1990 and 194 of 1991 etc etc) D/ 22 11 1991

Mithilesh Garg etc etc Petitioner v Union of India and others, ect etc, Respondents

Motor Vehicles Act (59 of 1988), Ss 80, 88 — Stage carriage permits — Grant of, to private operators — Liberalization policy — Not violative of Arts 19(1)(g), 14 — Object is to encourage healthy competition and eliminate corruption

Constitution of India, Arts 14, 19(1)(g)

A comparative reading of the provisions of the Act and the old Act (1939) makes it clear that the procedure for grant of permits under the new Act has been liberalised to such an extent that an intended operator can get a permit for asking irrespective of the number of operators already in the field The scheme envisaged under Ss 47 and 57 of the old Act has been completely done away with by the Act The right of existing operators to file objections and the provision to impose limit on the number of permits have been taken away There is no similar provision to that of S 47 and S 57 under the new Act The Statement of Objects and Reasons of the Act shows that the purpose of bringing in the Act was to liberalise the grant of permits

(Paras 5, 6)

There is no threat of any kind whatsoever under the new Act from any authority to the enjoyment of the right of the existing operators under Art 19(1)(g) to carry on the occupation of transport operators More operators mean healthy competition and efficient transport system Over crowded buses, passengers standing in the aisle, persons clinging to the bus doors and even sitting on the roof-top are some of the common sights in this country More often one finds a bus which has noisy engine old upholstry uncomfertable seats and continuous emission of black smoke from the exhaust pipe It is, therefore, necessary that there should be plenty of operators on every route to provide ample choice to the commuter-public to board the vehicle of their choice and patronise the operator who is providing the best service Even otherwise the liberal policy is likely to help in the elimination of corruption and favouritism in the process of granting permits Restricted licensing under the old Act led to the concentration of business in the hands of few person thereby giving rise to a kind of monopoly adversely affecting the public interest It cannot be said that too many operators on a route are likely to affect adversely the interest of weaker section of the profession The transport business is bound to be ironed out ultimately by the rationale of demand and supply Cost of a vehicle being as it is the business requires huge investment The intending operators are likely to be conscious of the economics underlying the profession Only such number of vehicles would finally remain in operation on a particular route as are economically viable In any case the transport system in a state is meant for the benefit and convenience of the public The policy to grant permits liberally under the Act is directed towards the said goal AIR 1976 SC 578, AIR 1954 SC 728 and AIR 1975 SC 389 Rel on

1983 All LJ 356 (SC) Disting

(Paras 7, 9)

The Act provides liberal policy for the grant of permits to those who intend to enter the motor transport business The provisions of the Act are in conformity with Art. 19(1)(g) When the State has chosen not to impose any restriction under Art 19(6) in respect of motor transport business and has left the citizens to enjoy their right under Art 19(1)(g) there can be no cause for complaint by the existing operators

(Para 10)

The three categories of permit-seekers i e inter region, intra region and inter-State cannot be considered to be belonging to the same class Different criteria have been provided under the Act for granting permits in respect of each of the categories Thus S 80 cannot be said to be violative of Art 14 on ground that the imposition of limit for grant of inter State permits is permissible under S 88(5) of the Act whereas no such limit can be imposed in respect of intra region permits

(Paras 12 14)

Cases Referred Chronological Paras

1983 All LJ 356 (1983) 2 SCC 195 AIR 1983 SC 383 (Distng) 13 14
AIR 1976 SC 578 (1976) 3 SCR 58 (Rel on) 7
AIR 1975 SC 389 (1975) 2 SCR 916 (Rel on) 11 12 13 14
AIR 1971 SC 246 8
AIR 1954 SC 728 (1955) 1 SCR 707 (Rel on) 10

KULDIP SINGH, J — The liberalization for private sector operations in the Road Transport field — under S 80 and other provisions of The Motor Vehicles Act 1988 — has been challenged in these bunch petitions under Art 32 of the Constitution filed by the existing operators, primarily on the ground that they have been adversely affected in the exercise of their rights under Art 14 and 19 of the Constitution of India

2 It is necessary to notice the statutory provisions operation in the field of motor transport business prior to and after the coming into force of The Motor Vehicles Act, 1988 (hereinafter called the act) The Motor Vehicles Act 1939 (hereinafter called the old Act) was enacted and enforced with the object of having closer control to establish a co-ordinated system of transport The subject of 'Mechanically Propelled Vehicles' being in List III of the VIIth Schedule to the Constitution, various amendments were made from time to time by several State Legislatures either adding to or modifying the provisions of the old Act Chapter IV of the old Act consisted of Ss 42 to 68 providing control of transport vehicles. Ss 47 and 57, to the relevant extent are reproduced as under —

"47 Procedure of Regional Transport Authority in considering applications for stage carriage permits — (1) A Regional Transport Authority shall in considering an application for a stage carriage permit have regard to the following matters namely —

(a) the interest of the public generally,

(b) the advantages to the public of the service to be provided including the saving of time likely to be effected thereby and any convenience arising from journeys not being broken

(c) the adequacy of other passenger transport services operating or likely to operate in the near future whether by road or other means between the places to be served

(d) the benefit to any particular locality or localities likely to be afforded by the service,

(e) the operation by the applicant of other transport services including those in respect of which application from him for permits are pending

(f) the condition of the roads included in the proposed route or area

and shall also take into consideration any representations made by persons already providing passenger transport facilities by any means along or near the proposed route or area, or by any association representing persons interested in the provision of road transport facilities recognized in this behalf by the state government or by any local authority or police authority within whose jurisdiction any part of the proposed route or area lies

(3) A Regional Transport Authority may, having regard to the matters mentioned in sub-section (1) limit the number of stage carriages generally or of any specified type for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region

57 Procedure in applying for and granting permits — (1) An application for a contract carriage permit or a private carrier's permit may be made at any time

(2) An application for a stage carriage permit or a public carrier's permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect, or, if the Regional Transport Authority appoints dates for the receipt of such applications, on such dates.

(3) On receipt of an application for a stage carriage permit or a public carrier's permit the Regional Transport Authority shall make the application available for inspection at the office of the Authority and shall publish the application or the substance thereof in the prescribed manner together with a notice of the date before which representation in connection therewith may be submitted and the date not being less than thirty days from such publication on which and the time and place at which the application and any representations received will be considered

Provided that if the grant of any permit in accordance with the application or with modifications would have the effect of increasing the number of vehicles operating in the region or in any area or any route within the region, under the class of permits to which the application relates beyond the limit fixed in that behalf under sub section (3) of S 47 or sub section (2) of S 55 as the case may be the Regional Transport Authority may summarily refuse the application without following the procedure laid down in this sub section

3 The old Act was repealed by the Act which came into force on July 1 1989 The Statement of Objects and Reasons appended to the Act is reproduced as under —

The Motor Vehicles Act 1939 (4 of 1939) consolidates and amends law relating to motor vehicles This has been amended several times to keep it up to date The need was however felt that this Act should now inter alia take into account also changes in the road transport technology pattern of passengers and freight movements development of the road network in the country and particularly the improved techniques in the motor vehicles management

2 Various Committees like National Transport Policy Committee National Police Commission Road Safety Committee Low Powered Two wheelers Committee as also the Law Commission have gone into different aspects of road transport They have recommended updating simplification and rationalisation of this law Several Members of Parliament have also urged for comprehensive review of the Motor Vehicles Act 1939 to make it relevant to the modern day requirements

3 A Working Group was therefore constituted in January 1984 to review all the provisions of the Motor Vehicles Act 1939 and to submit draft proposals for a comprehensive legislation to replace the existing Act This Working Group took into account the suggestion and recommendations earlier made by various bodies and institutions like Central Institute of Road Transport Automotive Research Association of India and other transport organisations including the manufacturers and the general public Besides obtaining comments of State Governments on the recommendations of the Working Group these were discussed in a specially convened meeting of Transport Ministers of all States and Union Territories Some of the more important modifications so suggested related for taking care of —

(a)

(b)

(c) the greater flow of passenger and freight with the least impediments so that islands of isolation are not created leading to regional or local imbalances

(d)

(e) simplification of procedure and policy liberalisation for private sector operations in the road transport field and

(f)

The proposed legislation has been prepared in the light of the above background Some of the more important provisions of the Bill provide for the following matters namely —

(a) to (f)

(g) liberalised scheme for grant of stage carriage permits on non nationalised routes all India tourist permits and also national permits for goods carriages

(h) to (l)

4 Chapter V of the Act — substitutes for Chapter IV of the old Act — consisting of

S 66 to 96, provides for control of transport vehicles Sections 71, 72 and 80, to the relevant extent, are reproduced as under

"71 Procedure of Regional Transport Authority in considering application for stage carriage permit — (1) A Regional Transport Authority shall, while considering an application for a stage carriage permit, have regard to the objects of this Act

Provided that such a permit for a route of fifty kilometres or less shall be granted only to an individual or a State transport undertaking

(2) A Regional Transport Authority shall refuse to grant a stage carriage permit if it appears from any time table furnished that the provisions of this Act relating to the speed at which vehicles may be driven are likely to be contravened

Provided that before such refusal an opportunity shall be given to the applicant to amend the time-table so as to conform to the said provisions

(3)(a) The State Government shall, if so directed by the Central Government having regard to the number of vehicles, road conditions and other relevant matters, by notification in the Official Gazette, direct a State Transport Authority and a Regional Transport Authority to limit the number of stage carriages generally or of any specified type, as may be fixed and specified in the notification, operating on city routes in towns with a population of not less than five lakhs

(4) A Regional Transport Authority shall not grant more than five stage carriage permits to any individual or more than ten stage carriage permits to any company (not being a State transport undertaking)

(5) In computing the number of permits to be granted under sub-sec (4), the permits held by an applicant in the name of any other persons and the permits held by any company of which such applicant is a director shall also be taken into account

72 Grant of stage carriage permits — (1) Subject to the provisions of S 71 a Regional Transport Authority may on an application made to it under S 70, grant a stage carriage permit in accordance with the application or with such modifications as it deems fit or refuse to grant such a permit

Provided that no such permit shall be granted in respect of any route or area not specified in the application

80 Procedure in applying for and granting permits. — (1) An application for a permit of any kind may be made at any time

(2) A Regional Transport Authority shall not ordinarily refuse to grant an application for permit of any kind made at any time under this Act

Provided that the Regional Transport Authority may summarily refuse the application if the grant of any permit in accordance with the application would have the effect of increasing the number of stage carriages as fixed and specified in a notification in the Official Gazette under clause (a) of sub sec (3) of S 71 or of contract carriages as fixed and specified in a notification in the Official Gazette under clause (a) of sub sec (3) of S 74

Provided further that where a Regional Transport Authority refuses an application for the grant of a permit of any kind under this Act it shall give to the applicant in writing its reasons for the refusal of the same and an opportunity of being heard in the matter"

5 A comparative reading of the provisions of the Act and the old Act makes it clear that the procedure for grant of permits under the Act has been liberalised to such an extent that an intended operator can get a permit for asking irrespective of the number of operators already in the field Under S 57 read with S 47(1) of the old Act an application for a stage carriage permit was to be published and kept for inspection in the office of the Regional Transport Authority so that the existing operators could file representations/objections against the said application The application, along with objections, was required to be decided in a quasi judicial manner, S 47(3) of the old Act further permitted the imposition of limit on the grant of permits in any region, area or on

a particular route It is thus obvious that the main features of chapter IV control of transport vehicles under old Act were as under

1 The application for grant of permits were published and were made available in the office of the Regional Transport Authority so that the existing operators could file representations

2 The applications for grant of permits along with the representations were to be decided in quasi judicial manner and

3 The Regional Transport Authority was to decide the applications for grant of permits keeping in view the criteria laid down in S 47(1) and also keeping in view the limit fixed under S 47(3) of the Act An application for grant of permit beyond the limited number fixed under S 47(3) was to be rejected summarily

6 The Parliament in its wisdom has completely effaced the above features The scheme envisaged under Ss 47 and 57 of the old Act has been completely done away with by the Act The right of existing operators to file objections and the provision to impose limit on the number of permits have been taken away There is no similar provision to that of S 47 and S 57 under the Act The Statement of Objects and Reasons of the Act shows that the purpose of bringing in the Act was to liberalise the grant of permits S 71(1) of the Act provides that while considering an application for a stage carriage permit the Regional Transport Authority shall have regard to the objects of the Act S 80(2), which is the harbinger of Liberalisation provides that a Regional Transport Authority shall not ordinarily refuse to grant an application for permit of any kind made at any time under the Act There is no provision under the Act like that of S 47(3) of the old Act and as such no limit for the grant of permits can be fixed under the Act There is, however, a provision under S 71(3)(a) of the Act under which a limit can be fixed for the grant of permits in respect of the routes which are within a town having population of more than five lakhs

7 The petitioners are existing stage carriage operators on different routes They hold permits granted by the Regional Transport Authorities concerned Mithilesh Garg, petitioner in Civil Writ Petition No 1345/89 has stated that he holds a stage carriage permit and plies his vehicles on the Meerut Parikshitgarh Hisfabad Laliana and allied routes under the jurisdiction of the Regional Transport Authority Meerut According to him prior to the enforcement of the act 23 permit holders were operating on the said route but thereafter under S 80 of the Act the Regional Transport Authority Meerut has issued 272 more permits in respect of the same route Similar facts have been stated in the other writ petitions As mentioned above the petitioners are permit holders and are existing operators They are plying their vehicles on the routes assigned to them under the permits They are in the full enjoyment of their fundamental right guaranteed to them under Article 19(1)(g) of the Constitution of India There is no threat of any kind whatsoever from any authority to the enjoyment of their right to carry on the occupation of transport operators There is no complaint of infringement of any of their statutory rights Their only effort is to stop the new operators from coming in the field as competitors We see no justification in the petitioners stand More operators mean healthy competition and efficient transport system Over crowded buses passengers standing in the aisle persons clinging to the bus doors and even sitting on the roof top are some of the common sights in this country More often one finds a bus with the noisy engine old upholstry uncomfortable seats and continuous emission of black smoke from the exhaust pipe It is therefore, necessary that there should be plenty of operators on every route to provide ample choice to the commuter public to board the vehicle of their choice and patronise the operator who is providing the best service Even otherwise the liberal policy is likely to help in the elimination of corruption and favouritism in the process of granting permits Restricted licensing under the old Act led to the concentration of business in the hands of few persons thereby giving rise to a kind of monopoly adversely affecting the public

interest. The apprehensions of the petitioners that too many operators on a route are likely to affect adversely the interest of weaker section of the profession is without any basis. The transport business is bound to be ironed out ultimately by the rationable of demand and supply. Cost of a vehicle being as it is the business requires huge investment. The intending operators are likely to be conscious of the economics underlying the profession. Only such number of vehicles would finally remain in operation on a particular route as are economically viable. In any case the transport system in a state is meant for the benefit and convenience of the public. The policy to grant permits liberally under the Act is directed towards the said goal. The petitioners who are already in the business want to keep the fresh entrants out of it and as such eliminate the healthy competition which is necessary to bring efficiency in the trade. This Court in Jasbhai Desai v. Roshan Kumar, (1976) 3 SCR 58 : (AIR 1976 SC 578) posed the following questions for its determination (Para 1) :—

> "Whether the proprietor of a cinema theatre holding a licence for exhibiting cinematograph films, is entitled to invoke the certiorari jurisdiction ex debito justitiae to get a 'No Objection Certificate', granted under Rule 6 of the Bombay Cinema Rules, 1954 (for short, the Rules) by the District Magistrate in favour of a rival in the trade, brought up and quashed on the ground that it suffers from a defect of jurisdiction, is the principal question that falls to be determined in this appeal by special leave."

8. Sarkaria, J. speaking for the Court answered the question in the following words (Paras 47, 49, 50 and 51 of AIR) :—

> "In the light of the above discussion, it is demonstrably clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully affect his title to something. He has not been subjected to a legal wrong. He has suffered no legal grievance. He has no legal peg for a justiciable claim to hang on. .... While a Procrustean approach should be avoided, as a rule the Court should not interfere at the instance of a 'stranger' unless there are exceptional circumstances involving a grave miscarriage of justice having an adverse impact on public interests. Assuming that the appellant is a 'stranger' and not a busybody then also there are no exceptional circumstances in the present case which would justify the issue of a writ of certiorari at his instance. On the contrary, the result of the exercise of these discretionary powers, in his favour will, on balance, be against public policy. It will eliminate healthy competition in this business which is so essential to raise commercial morality; it will tend to perpetuate the appellant's monopoly of cinema business in the town; and above all, it will, in effect, seriously injure the fundamental rights of respondents 1 & 2, which they have under Article 19(1)(g) of the constitution, to carry on trade or business subject to reasonable restrictions imposed by law. The instant case falls well nigh within the ratio of this Court's decision in Rice and Flour Mills v. N. T. Gowda (AIR 1971 SC 246) wherein it was held that a rice mill owner has no locus standi to challenge under Article 226, the setting up of a new rice mill by another — even if such setting up be in contravention of S. 8(3)(c) of the Rice Milling Industry (Regulation) Act, 1958 — because no right vested in such an applicant is infringed. For all the foregoing reasons, we are of opinion that the appellant had no locus standi to invoke this special jurisdiction under Art. 226 of the Constitution. Accordingly, we answer the question posed at the commencement of this judgment, in the negative."

9. We, therefore, see no justification for the petitioners to complain against the liberalised policy for grant of permits under the Act.

10. Article 19(1)(g) of the Constitution of India guarantees to all citizens the right to practice any profession, or to carry on any occupation, trade or business subject to reasonable restrictions imposed by the State under Art. 19(6) of the Constitution of India. A Constitution Bench of this Court in Saghir

Ahmad v State of U P, 1955' 1 SCR 707) AIR 1954 SC 728' held that the fundamental right under Article 19 1 g) entitles any member of the public to carry on the business of transporting passengers with the aid of the vehicles Mukerjea, J speaking for the Court observed as under (at p 735 of AIR)

' Within the limits imposed by State regulations any member of the public can ply motor vehicles on a public road To that extent he can also carry on the business of transporting passengers with the aid of the vehicles It is to this carrying on of the trade or business that the guarantee in Art 19(1)(g) is attracted and a citizen can legitimately complain if any legislation takes away or curtails that right any more than is permissible under clause (6) of that article

It is thus a guaranteed right of every citizen whether rich or poor to take up and carry on if he so wishes the motor transport business It is only the State which can impose reasonable restrictions within the ambit of Art 19(6) of the Constitution of India Ss 47(3) and 57 of the old Act were some of the restrictions which were imposed by the State on the enjoyment of the right under Art 19(1)(g) so far as the motor transport business was concerned The said restrictions have been taken away and the provisions of Ss 47(3) and 57 of the old Act have been repealed from the Statute Book The Act provides liberal policy for the grant of permits to those who intend to enter the motor transport business The provisions of the Act are in conformity with Art 19(1)(g) of the Constitution of India The petitioners are asking this Court to do what the Parliament has undone When the State has chosen not to impose any restriction under Art 19(6) of the Constitution of India in respect of motor transport business and has left citizens to enjoy their right under Art 19(1)(g) there can be no cause for complaint by the petitioners

11 On an earlier occasion this Court dealt with somewhat similar situation The Uttar Pradesh Government amended the old Act by the Motor Vehicle (U P Amendment) Act 1972 and inserted S 43A The new S 43A apart from making certain changes in S 47 of the old Act also omitted sub-section (3) of S 47 of the old Act S 43A provided that in the case of non-nationalised routes if the State Government was of the opinion that it was for the public interest to grant permits to all eligible applicants it might by notification in the official gazette issue a direction accordingly The necessary notification was issued with the result that the transport authorities were to proceed to grant permits as if sub-section (3) of S 47 was omitted and there was no limit for the grant of permits on any specified route within the region S 43A and the consequent notification was challenged by the existing operators before the Allahabad High Court The High Court dismissed the writ petition On appeal this Court in Hans Raj Kedar v State of U P (1975) 2 SCR 916 (AIR 1975 SC 389) dismissed the appeal Khanna, J speaking for the Court held as under (Paras 6 and 8 of AIR) —

It hardly needs much argument to show that the larger number of buses operating on different routes would be for the convenience and benefit of the travelling public and as such would be in the public interest Any measure which results in larger number of buses operating on various routes would necessarily eliminate or in any case minimise long hours of waiting at the bus stands It would also relieve congestion and provide for quick and prompt transport service Good transport service is one of the basic requirements of a progressive society Prompt and quick transport service being a great boon for those who travel, any measure which provides for such an amenity is in the very nature of things in the public interest The contention that the impugned notification is violative of the rights of the appellants under Art 19(1)(f) or (g) of the Constitution is equally devoid of force There is nothing in the notification which prevents the appellants from acquiring holding and disposing of their property or prevents them from practising any profession or from carrying on any occupation, trade or business The fact that some others have also been enabled to obtain permits for running buses cannot constitute a violation of the appellants rights under the above two clauses of Art 19 of the Constitution The above provisions are not intended to grant a kind of monopoly to a few bus operators to the exclusion of other eligible persons No right is guaranteed to any private party by Art 19 of the Constitution for carrying on trade and business without competition from other eligible persons Clause (g) of Art 19(1) gives a right to all citizens subject to Art 19(6) to practise any profession or to carry on any occupation, trade or business It is an enabling provision and does not confer a right on those already practising a profession or carrying on any occupation, trade or business to exclude and debar fresh eligible entrants from practising that profession or from carrying on that occupation, trade or business the said provision is not intended to make any profession, business or trade the exclusive preserve of a few persons We, therefore, find no valid basis for holding that the impugned provisions are violative of Art 19

The identical situation has been created by Ss 71, 72 and 80 of the Act by omitting the provisions of S 47(3) of the old Act It has been made easier for any person to obtain a stage carriage permit under the Act The attack of the petitioner on S 80 on the ground of Art 19 has squarely been answered by this Court in Hans Raj Kher's case (AIR 1975 SC 389) (supra)

12 It has been contended in the writ petitions that different yard-sticks have been provided for inter region intra region and inter State permits under the Act According to the petitioners the imposition of limit for grant of inter State permits is permissible under S. 88(5) of the Act whereas no such limit can be imposed in respect of intra region permits The contention is that the provisions are discriminatory and are violative of Art 14 of the Constitution of India We are not impressed by the argument The three categories of permit seekers cannot be considered to be belonging to the same class Different criteria have been provided under the Act for granting permits in respect of each of the categories It is nobody's case that S 80 brings about discrimination in the matter of grant of permits between applicants belonging to the same class The argument on the ground of Art 14 is thus wholly untenable and is rejected This question also came for consideration in Hans Raj Kher's case (AIR 1975 SC 389) (supra) and this Court rejected the contention in the following words (Para 7) —

Argument has also been advanced that the deletion of S 47(3) would have the effect of removing the limit on the number of permits for intra region routes but that fact would not prevent the imposition of a limit for the number of permits for inter region routes This argument has been advanced in the context of the case of the appellants that the impugned provisions discriminate in the matter of issue of permits for intra region routes and those for inter region routes and as such are violative of Art 14 of the Constitution We are not impressed by this argument for we find no valid basis for the inference that if there is no limit on the number of permits for intra region routes, limit on the number of permits for inter region routes would have to be imposed The object of the impugned notification is to liberalise the issue of permits and we fail to see as to how such a liberal measure can have the effect of introducing strictness or stringency in the matter of grant of permits for inter region routes Assuming that a different rule is applicable in the matter of inter region routes, the differentiation is based upon reasonable classification It is nobody's case that the impugned provision beings about discrimination in the matter of grant of permits between applicants belonging to the same class The argument above the impugned provision being violative of article 14 is wholly untenable "

13 The learned counsel for the writ petitioners have relied upon a later decision of this Court in Rameshwar Prasad v State of

356) and have contended that the decision of this Court in Hans Raj Kehar's case (AIR 1975 SC 389) (supra) no longer holds the field. There is no force in the contention. This Court on two occasions interpreted the old Act as amended by the State of Uttar Pradesh at the relevant times. The provisions of law which were interpreted in Hans Raj Kehar's case were entirely different than those which were before this Court in Rameshwar Prasad's case. The legal position with which we are faced in these writ petitions is almost similar to that which was considered by this Court in Hans Raj Kehar's case. What happened in the State of Uttar Pradesh was that after the U.P. Amendment of 1972 to the old Act, which was subject matter of interpretation before this Court in Hans Raj Kehar's case it was found that certain anomalies had arisen in the working of the liberal policy of granting permits. With a view to remedy the situation the U.P. Legislature amended the old Act again by the U.P. Act 15 of 1976 permitting imposition of limit on the number of permits to be issued. In spite of the restrictions on grant of permits as provided in the U.P. Act 15 of 1976 the State Government issued notifications permitting grant of permits to all eligible applicants without any upper limit. This Court held in Rameshwar Prasad's case that the said notifications were inconsistent with the limitation as to the number of permits introduced by the U.P. Amending Act 1976 and as such were bad in law. Venkataramiah, J. (as he then was) speaking for the Court in Rameshwar Prasad's case (1983 All LJ 356) observed as under (Para 19):

> "We may here state that any observations made in Hans Raj Kehar case would be inapplicable so far as these cases presently before us are concerned. In that case the court was concerned with sub section (2) of S. 43A of the Act as it stood then which was a provision enacted by the legislature. That sub-section provided that without prejudice to the generality of the power contained in S. 43A(1) of the Act where the State Government was of opinion that it was in public interest to grant stage carriage permits (except in respect of routes or areas for which schemes have been published under S. 68(C) or contract carriage permits or public carrier permits to all eligible applicants it may issue appropriate directions as stated therein. That sub-section contained a clear legislative policy which considered that there could be no public prejudice if all eligible applicants were granted permits. Without saying anything more on the point, it may be stated that whatever this court may have observed while considering that provision would not apply now as there is a clear departure made by the legislature from that policy when it enacted the new sub section (2) of S. 43A.

It is thus obvious that the reliance by the petitioners on the ratio and observations of this Court in Rameshwar Prasad's case is wholly misplaced. The Parliament has under the Act made a clear departure from the policy and has reverted to the position which was before this Court in Hans Raj Kehar's case.

14. Relying on Rameshwar Prasad's case the petitioners contend that it is in public interest to limit the grant of permits on intra-region routes and while fixing the limit various factors indicated by this Court in the said case are to be taken into consideration. We do not agree. The concept of public interest, in relation to motor transport business, as propounded by this Court in Rameshwar Prasad's case was only in the context of the old Act as amended by the U.P. Act. We are of the view that the Act having brought-in complete change in the policy of granting permits, the observations of this Court in Rameshwar Prasad's case (1983 All LJ 356) are not relevant in the present context. The provisions of law for consideration before this Court in Hans Raj Kehar's case were almost similar to S. 80 of the Act. We are, therefore, bound by the law laid down by the four-Judges Bench of this court in Hans Raj Kehar's case (AIR 1975 SC 389).

15 The petitioners have further contended that the conditions of roads, social status of the applicants, possibility of small operators being eliminated by big operators conditions of hilly routes, fuel availability and pollution control are some of the important factors which the Regional Transport Authority is bound to take into consideration while taking a decision on an application for grant of permit These are the matters which are supposed to be within the comprehension of the transport authorities The legislative policy under the Act cannot be challenged on these grounds It is not disputed that the Regional Transport Authority has the power under the Act to refuse an application for grant of permit by giving reasons It is for the authority to take into consideration all the relevant factors at the time of quasi judicial consideration of the applications for grant of permits The statutory authorities under the Act are bound to keep a watch on the erroneous and illegal exercise of power in granting permits under the liberalised policy

16 We, therefore, see no force in any of the contentions raised by the petitioners and as such we dismiss the writ petitions The parties are left to bear their own costs

Petitions dismissed

1991 ALL L J 1076

B L YADAV J

Jagdesh Narain and anothers, Appellants v Shankh Narain and other Respondents

S A No 170 of 1976 D/ 24 7 1991 *

Civil P C (5 of 1908), S 100 — Second Appeal — Concurrent findings of facts — Finding that plaintiff has no right and title over land and was not entitled to the benefit of S 9 of Act — Is concurrent finding of fact — Cannot be interfered by High Court

U P Zamindari Abolition and Land Reforms Act (1 of 1951), S 9

(Para 10)

Cases Referred	**Chronological Paras**
1988 All LJ 68 1987 All WC 1255	3
AIR 1983 All 124 AIR 1923 Mad 647 (FB)	7
(1759) 97 ER 532 Douglass v Yallop	8

Mr Radhey Shyam for Appellants S N Singh R N Singh and S K Mishra, for Respondents

JUDGMENT — This is plaintiffs second appeal in suit for cancellation of the sale deed in favour of defendants and for permanent injunction restraining the defendants from interfering with the peaceful possession of the plaintiffs

2 The suit was filed with the allegations that the land in dispute in respect of which sale deed dated 7 8 1969 was executed by Jamnaram was abadi of the plaintiffs and they were in possession over the same and Jamnaram has no right or title over the land in dispute The suit was contested by the defendants denying the plaint allegations and alleging that Jamnaram has full right and title over the land in dispute and sale deed has correctly been executed in favour of the defendants Both the courts below have dismissed the suit hence present second appeal has been filed

3 Mr Radhay Shyam, learned counsel for the appellants urged that in view of the report of Distt Judge Allahabad dated 13-10 1986 the original record of suit No 342 of 1969 and in first Appeal No 94 of 1979 pertaining to present second appeal has been burnt in the fire in the Distt Court Allahabad consequently record may be reconstructed and then only appeal may be decided on merits Reliance was placed on U P State Road Transport Corporation Lucknow v Smt Geeta Devi, AIR 1983 All 124 and Ram Khelawan v D D C Allahabad, 1987 All WC 1255 (1988 All LJ 68) On merits however, it was urged that as vendor had no right or title in the land in dispute hence sale deed is liable to be set aside It was further urged that the plaintiffs were entitled to the benefit of S 9 of U P Z A & L R Act

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* Against judgment and decree of V K Sarcar Addl Civil Judge Allahabad, D/ 17 9 1975

4 Mr S N Singh learned counsel for the respondents urged that in spite of sufficient opportunity given to the plaintiff/appellants they did not take any initiative for reconstruction of the record even though the defendant/respondents have done their part of duty for reconstruction of the record consequently there is no justification for granting any further time for reconstruction of the record Moreover the scope for interference by the Hon'ble Court in second appeal depends on the substantial question of law involved On merits it was urged that vendor has got every right and title over the land in dispute conseqeuntly the sale deed is legal and valid It was further urged that the plaintiffs were not entitled to the benefit of S 9 of U P Z A & L R Act and the second appeal is concluded by the findings of fact

5 Having heard learned counsel for the parties, so far as reconstruction of the record is concerned, it appears that this Court by order dated 13 7-1989 directed the appellant to assist in the reconstruction of the record within a month Thereafter on 2 8 90 after more than a year again learned counsel for the appellant prayed for and was granted a month's and no more time for taking steps with regard to reconstruction of the record In spite of stop order, learned counsel for the appellant on 28 11 90 prayed for and was granted six weeks time for reconstruction of the record. However, even then record could not be reconstructed till today Thus it is obvious that in spite of more than sufficient time having been granted plaintiff has not taken steps for reconstruction of the record on one pretext or the other were as the defendants have always been co-operating and taking steps for reconstruction of the 'record Under these circumstances even if reconstruction of record may be very essential but in case plaintiff himself did not take any step there is no option but to decide the case on the basis of arguments advanced by the learned counsel for the parties and after perusal of judgments of the courts below and in accordance with law

6 As regards the cases relied upon by the learned counsel for the appellant, in U P State Road Transport Corporation Lucknow v Smt Geeta Devi AIR 1983 All 124 Division Bench of this Court directed claims Tribunal to serve parties with the notices requiring them to produce copies of the statements of witnesses if have the same in their possession, within 3 weeks and in case copies were produced before the claims Tribunal it will satisfy itself whether they are correct copies and in case they fail to do so, the Tribunal may direct the parties to reproduce the witnesses for making statements In the present case as stated in the paragraph here in before, that more than sufficient time was granted but the appellant did not take steps for reconstruction of the record Moreever it is second appeal which may be disposed of on the basis of substantial questions of law involved

7 In Marakkarutti v Veerankutty AIR 1923 Madras 647 (FB) it was observed that one can safely start with the proposition that there is inherent power in every court to reconstruct its own record

8 In Douglass v Yallop (1759) 97 ER 532 where the record was lost in transit from one court to other it was held that course open to the lower appellate court was to receive such secondary evidence of the contents of the original document or to order entirely new trial

9 In the present case circumstances are quite different where decision of this court is to be based on the appraisal of the evidence oral and documentary in that event it becomes necessary to reconstruct the record. In second appeal under S 100 CPC decision is based on substantial question of law involved in the appeal and not on appraisal of evidence on the record No doubt if some documentary evidence of title has been misread or misinterpreted in that even record may be absolutely necessary In this case there is nothing like that This case may be decided

on the basis of substantial questions of law involved and perusal of impugned judgments, in the light of arguments advanced by the learned counsel for the parties, because in spite of time granted, plaintiff/appellant did not take steps for reconstruction of the record where as defendant respondent has always been doing his part of duty for reconstruction of the record

10 It appears from perusal of impugned judgments that both the courts below have appreciated entire evidence on the record and both the questions have been answered against the plaintiff appellant and inference has been drawn that the plaintiff has no right and title over the land in dispute It is purely a question of fact and has been answered against the plaintiff appellant Second question has also been answered by both the courts below that plaintiff/appellant was not entitled to the benefit of S 9 of U P Z A & L R Act The findings recorded by the courts below are findings of fact and need not be interfered with by this court under S 100 of Code of Civil Procedure No question of law much less substantial question of law is involved in this appeal

11 In view of the premises aforesaid, the appeal having no merits is dismissed with costs

Appeal dismissed

1991 ALL L J 1078

A N VARMA AND
R K GULATI, JJ

Kashi Prasad Singh, Petitioner v Collector and District Magistrate Varanasi and others, Respondents

C M W P No 1542 of 1978, D/ 24 7 1991

(A) U P Co-operative Societies Act (11 of 1966), S 95 A (1) — Recovery proceedings — Holding of enquiry by way of notice is sine quo non

Holding of an enquiry before forwarding reecovery certificate under S 95A by Registrar on account of amount which remained outstanding against petitioner under an Award is sine quo non Enquiry necessarily implies giving of notice to the person sought to be proceeded against under that provision

(Para 3)

(B) U P Co-operative Societies Act (11 of 1966), Ss 95A, 92, 93 — Recovery of amount due under an Award — Proceedings under S 95A cannot be resorted — Separate and distinct provisions are provided under Act

Section 95A is a special procedure confined and applicable only for recovery of loans Where amount sought to be recovered from the petitioner was not due on account of any loan advanced to him by co-operative society, but was balance due under an award rendered in arbitration on finding that petitioner had embezzled the amount, proceedings under S 95A were incompetent and liable to be quashed

(Para 5)

Sri Ram Niwas, for Petitioner, Standing Counsel, for Respondents

A N VARMA, J — This petition is directed against the recovery proceedings which have been initiated against the petitioner at the instance of the Registrar, Co operative Societies in the purported exercise of powers under S 95A(1) of the U P Co operative Societies Act

2 It appears that the impugned recovery proceedings were initiated against the petitioner on a certificate issued by the Registrar under S 95A on account of the amount which remained outstanding against him under an award That is the case pleaded by the respondents in the counter affidavit filed on their behalf

For the petitioner two points have been urged

(1) No notice whatsoever was issued by the the Registrar before he forwarded the

recovery certificate under S 95A to the Collector and

(2) The amount which was sought to be recovered from the petitioner under S 95A was, on the own showing of the respondents not an amount claimed as any arrears of loan advanced by a Co-operative Society to the petitioner

3 Having heard learned counsel for the petitioner and the learned standing counsel, we are clearly of the view that both these points have merit and must be accepted So far as the first contention is concerned, it does not appear to have been disputed in the counter affidavit that no enquiry was held by the Registrar by way of a notice to the petitioner before forwarding the recovery certificate Under S 95A holding of an enquiry is a sine qua non Enquiry necessarily implies a notice to the person sought to be proceeded against under that provision As no notice was issued to the petitioner, it is apparent that the impugned recovery proceedings cannot be sustained and must, therefore, be quashed

4 The petitioner stands on a firmer ground on the second point The case set up in the counter affidavit is that the amount sought to be recovered is the balance which was outstanding against the petitioner under an award It is indisputable that special procedure which has been enacted under S 95A of the U P Co operative Societies Act, can be pressed in aid only with respect to the recovery of arrear of any loan advanced by a Co-operative society to the person sought to be proceeded against The respondents do not contend that the amount sought to be recovered from the petitioner is due on account of any loan advanced to him The amount, according to the respondents, is the amount which is the balance due under an award rendered in arbitration on the finding that the petitioner has embezzelled the amount

5 The proceedings under S 95A were wholly incompetent in the present case and the same are liable to be quashed on this ground as well It may be mentioned that a separate and distinct procedure has been provided under the Act under Ss 92 93 and 94 of the U P Co operative Societies Act for recovery of amount due under award S 95A, on the other hand, is a special procedure confined and applicable only for recovery of loans

6 In the premise the petition succeeds and is allowed The impugned recovery proceedings consequent upon the letter dated 30 1 1978, issued by the respondent No 1 are quashed There shall be no order as to costs.

Petition allowed

1991 ALL. L J 1079

S K DHAON AND
S K MOOKERJI JJ

Sri Bajrang Oil Company Gorakhpur, and others, Petitioners v State of U P Respondent

C M W P No 10919 of 1990 D/ 8-4 1991

Interpretation of statutes — Language of statute — Additional words — Accidental slip of unintentional omission — Can be rectified — Categorisation of city as per its population — Omission to mention particular city unintentional — Rectification does not amount to producing casus omissus

Essential Commodities Act (10 of 1955), S 3

Edible Oil (Storage Control) Order 1981, Sch III

Where it was intention of the draftsman that cities having a population of three lacs and more but not less than ten lacs should be placed in Sch III of the Edible Oil (Storage Control) Order 1981, and Gorakhpur City was left out from being categorised in Sch III on account of some inadvertence, the omission being unintentional it was within jurisdiction of High Court to rectify that mistake and it would not amount to producing a casus omissus Casus omissus will not come into existence in a situation where in spite of the intention of the draftsman to the contrary, an error or an omission has crept in and the same is rectified by the Court

(Paras 9 10)

Cases Referred Chronological	**Paras**
AIR 1990 SC 933	9
(1965) 1 WLR 892 (1965) 2 All ER 382 (HL), Cromas Properties Ltd v Cannought Fer Trimmings Ltd	7
AIR 1961 SC 1107	8
(1949) 2 All ER 155 (1949) 2 KB 481 68 TLR 379 (CA) Seaford Court Estates Ltd v Asher	8
(1888) 13 AC 595 59 LT 697 37 WR 449 (HL), Mersey Docks and Harbour Board v Henderson Brothers	9
(1846) 4 Moo Ind App 179 13 ER 582	6
Moore PC 1, Crawford v Spooner	9

A P N Giri, for Petitioners Standing Counsel for Respondents

S K DHAON, J — Petitioners are traders in the city of Gorakhpur They have been granted licences under the U P Scheduled Commodities Dealers (Licensing and Restriction on Hoarding) Order, 1989 (hereinafter referred to as the Order) Edible Oil is one of scheduled commodities enumerated in the Order Prior to the enforcement of the Order, the petitioners held licences for stocking edible oil under the Pulses, Edible Oilseeds and Edible Oil (Storage Control) Order, 1977 as amended by the Order of 1981 Under the aforesaid Order, Gorakhpur was categorised as "B" city as its population was three lacs and more but less than ten lacs On that basis, the petitioners were permitted to keep in stock a certain quantity of edible oil Under the Order, Gorakhpur has not been categorised as "B" city Naturally, the limit of stock of edible oil which can be held at a particular time by a licensed dealer has been reduced The petitioners challenge the non categorisation of Gorakhpur as "B" city as shown in Schedule III of the Order

2 Clause 2(b) of the Order defines "B" city to mean a city specified as such in column 2 of Schedule III Schedule III has two columns The first column contains category "A" cities having population of ten lacs and above The second contains a list of the cities under the heading category "B" cities having population of three lacs and more but not more than ten lacs and capital city of the State Six cities are mentioned in this category They are Agra, Varanasi, Allahabad, Meerut Bareilly and Lucknow

3 In paragraph 3 of the writ petition it is averred that in the year 1981 Gorakhpur city had a population of more than three lacs This averment has not been denied in the counter affidavit This averment is corroborated by the fact that under the 1977 Order, as amended by 1981 Order, even the Central Government had accepted the position that the city of Gorakhpur had a population of three lacs and more but less than ten lacs It is thus apparent that on or before 31st August 1989, when the Order was enforced the population of Gorakhpur city was three lacs and more Therefore, the conclusion is inevitable that while drawing up Schedule III Gorakhpur city had been left out from Category "B" on account of some mistake or due to an inadvertence

4 Having reached the irresistible conclusion that the draftsman clearly indicated that the cities having a population of three lacs and more but less than ten lacs should be placed in Schedule III and having found that there was an accidental slip or unintentional omission to mention Gorakhpur City in Schedule III the question is Can we rectify the omission ? We can do so

5 The rule of interpretation of Statutes, where relevant, apply to direct or subordinate legislation alike In the field of interpretation there is mutual dependence of the Courts and the draftsmen Naked usurpation of legislative power" is beyond the bounds of the judiciary Nonetheless, judges, while applying Statute law, some make a minor inroad in the legislative field However, a maiden area or a sphere untouched by the legislature cannot be encroached upon by the judiciary Also an intentional omission by the legislature or its delegate cannot be

corrected by Judges Likewise an interpretation which may lead to a situation where it can be said that the legislature has omitted something from the Statute should be eschewed In other words casus omissus (the omitted case) should be avoided while discerning the legislative intent

6. Craise on Statute Law (Seventh Edition) at page 520 discusses correction of mistakes At page 522 he says —

"An evidently accidental omission in the Schedule to an Act may be supplied

In the instant case there can be no two opinions that the omission in the Schedule III is evidently accidental

7 Maxwell on the Interpretation of Statutes (Twelfth Edition) in Chapter XI at page 228 deals with 'exceptional construction" Case of Cramas Properties Ltd v Cannought Fer Trimmings Ltd (1965) 1 WLR 892 at page 899 is referred to wherein Lord Heid has said that he prefers to see a mistake on the part of the draftsman in doing his revision rather than a deliberte attempt to introduce an irrational rule 'The canons of construction are not so rigid as to prevent a realistic solution ' So far as the instant case is concerned, we have already emphasised that the draftsmen clearly intended that all cities having a population of three lacs of more and less than ten lacs should find place in Schedule III Therefore, there was no question of deliberate or intentional attempt not to keep Gorakhpur city under the canopy of Schedule III Lord Reid's dictum squarely applies to the facts and circumstances of the instant case

8 We are not oblivious of the opinion expressed by Marshall C J of the United States "Judicial power is never exercised for the purpose of giving effect to the will of the Judges, always for the purpose of giving effect to the will of the legislature or in other words to the will of the law' In the case in hand while supplying the omission we will not be imposing our will We shall be merely giving effect to the will of the draftsman We are tempted to fefer to the observations of Denning L J His Lordship said When a defect appears a Judge cannot simply fold his hands and blame the draftsman He must seek to work on the construction task of finding the intention of Parliament and then he must supplement the written words so as to give force and life to the intention of the legislature" A judge should ask himself the question how if the makers of the Act had themselves came across this ruck in the texture of if, they would have straightened it out ? He must then do so as they would have done A judge must not alter the material of which the Act is woven, but he should iron out the creases ' (Seaford Court Estates Ltd v Asher (1949) 2 All ER 155 at page 164 These observations have been quoted with approval by the Supreme Court in a number of cases It will be sufficient to refer to the case of M Pentiah v Muddala Veeramallappa, AIR 1961 SC 1107 at page 1115 The aforequoted observations of Denning LJ are apposite as, in the instant case, the draftsman had no other intention but to put all the cities having a population of more than three lacs and less than ten lacs in Schedule III and the draftsman would have had no alternative but to rectify its mistake

9 In P K Unni v Nirmala Industries, AIR 1990 SC 933 the controversy was as to what is the period prescribed for making an application under Rule 89 of Order XXI of the Code of Civil Procedure (as amended by the Act 104 of 1976) Prior to the enforcement of the Amending Act 104 of 1976 the period of limitation prescribed in Rule 92(2) of Order XXI was within theiry days from the date of sale At that stage Art. 127 of the Limitation Act, 1963 also prescribed a limitation of thirty days from the date of the sale However, by the Amending Act 104 of 1976 thirty days' in Art 127 was substituted by sixty days' The High Court concerned opiend that there was a defect or an omission in Rule 92(2) of Order XXI and instead of thirty days, sixty days should be read in that provision The Supreme Court observes that

there is inconsistency between the two sets of provisions prescribing different periods of limitation Both the provisions can be worked out The Court cannot add words to a statute or read into it the words which are not there especially when the literal reading produces intelligible result The Court has quoted with approval the opinion expressed by Lord Halsbury in Mersey Docks and Harbour Board v Henderson Brothers, (1888) 13 AC 595 at page 602

> 'No case can be found to authorise any Court to alter a word so as produce casus omissus"

Again the Supreme Court has quoted with approval the opinion expressed in Craqford v Spooner (1846) 4 Moo Ind App 179

> We cannot aid the Legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up the deficiencies which are there'

In this back drop, no doubt, the Supreme Court in paragraph 15 has observed "assuming that there is a defect or omission in the words used in the legislation, the Court would not go to its aid to correct or make up the deficiency" In our opinion the said observations of the Supreme Court do not militate against the view we are proposing to take that the instant case is a case of a purely accidental omission and, therefore, we shall be within our jurisdiction to rectify the defect. We may emphasise that the case in hand is not the one where the intention of the draftsman is not clear, it is not a case where by our action we will be producing a casus omissus On the contrary, a literal reading of Schedule III itself is producing a comprehensible result that Gorakhpur city is accidentally not finding a place in Schedule III when the intention is that it should

10 Casus omissus means a case omitted A matter which should have been, but has not been provided for in a statute The doctrine is a constraint on judicial law making It puts a fetter on the law applying organ (the Court) to create law It prevents the Court from supplementing the statute to fulfil the broader purpose beyond the statute" The doctrine has a negative implication and that is that the legislature by its express of implied intendment occupied the field to the exclusion of the Court

11 Casus omissus rule plays a role in the operation of the plain meaning rule If an idea has not been stated, the Court may not supply it It does not come into play for the purpose of ascertaining the meaning of a statute It has its utility after the meaning has been ascertained and when the inquiry is what does the statute mean? At best, it may be described as an assumed limitation on the scope of judicial law making with respect to an area which has been left out untouched by a statute whose meaning has already been ascertained We therefore, take the view that casus omissus will not come into existence in a situation where, in spite of the intention of the draftsman to the contrary, an error or an omission has crept in and the same is rectified by the Court

12 We direct the respondent to treat the city of Gorakhpur as "B" city for the purposes of the Order We also direct the respondent to permit the petitioners to hold the stock of such quantity of edible oil as can be held under the law by a licensed dealer in the category "B" city

13 With these directions the petition is disposed of finally but without any order as to costs

14 Copy of the order may be given to the learned counsel for the petitioners on payment of usual charges

Order accordingly

1991 ALL L J 1083

M L BHAT J

Committee of Management, Uchchatar Madhyamik Vidyalaya, Newaria, Petitioner v Deputy Director of Education Vth Region Varanasi, and others Respondents

Civil Misc Writ Petn No 15343 of 1987 D/ 13 9 1991

(A) U P Intermediate Education Act (1921), S 16A(7) — Powers under Managing Committee of Institution — Claim by two rival Committees — Deputy Director can decide which of them was validly elected — He cannot annul election in toto and appoint authorised controller

(Paras 22, 23)

(B) U P Intermediate Education Act (1921), S 16A(7) — Election of Managing Committee — Amendment of Scheme of Administration — Appointment of authorised controller after expiry of terms of 3 years and 1 month to hold elections according to it — Amendment prospective in nature — Managing Committee constituted before amendment can conduct election under unamended scheme

Case law discussed

(Para 17)

Cases Referred	**Chronological**	**Paras**
1988 All LJ 687	1988 UPLBEC 585	21
1988 All LJ 831	1988 UPLBEC 737	21
1988 All LJ 1023	1988 UPLBEC 402	21
1988 UPLBEC 267 (SC)		21
1986 All LJ 88		21
1985 All LJ 471		21
1985 All LJ 1005	1985 UPLBEC 241	21
1985 All LJ 1289	1985 UPLBEC 751	21
1983 Education Cases 244		21

D S M Tripathi and R L Sharma, for Petitioner, Standing Counsel and Ashok Bhushan, for Respondents

ORDER — The facts as are revealed from the writ petition are briefly stated A dispute had arisen in respect of the election of the managing committee of the institution in question held on 19 12 1982 The said dispute was referred to the Deputy Director of Education who by his order dated 19 4-1984 recognised one Vijai Narain as Manager The term of the committee of management was three years which according to the petitioner, would commence from 20 4-1984 to 19 4-1987 The new committee was to be elected on 20-4 1987 or one month thereafter The election was to be conducted by the committee of management under the scheme of administration and the committee of management was to hold office till the new committee of management was elected However, the scheme of administration of the institution was amended on 31 1 1985 In respect of the said election a civil suit was also filed which is said to have been dismissed

2 It is stated that the President of the Committee of Management was removed on 7 2 1986 by the 2/3rd majority of the members of the general body who expressed no confidence in him and in his place the then Vice-President was appointed as President of the committee of management This is reflected by Annexure 3 to the writ petition It is stated that the managing committee elected on 19 12 1982 could not be dissolved on 19 1 1986 or after the expiry of three years because under rules of the institution the out going committee of management was to continue to function till the new committee was elected or assumed charge of the management No vacuum could be allowed to prevail if the committee of management was to be removed immediately after the expiry of three years and one month It was to remain in office till fresh election was conducted The programme of election was notified by the then committee of management on 15 11 1985 A Returning Officer was also appointed A writ petition, being writ petition No 19670 of 1986 was filed by the then President, who was removed by vote of no confidence from the committee

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JI/AJ/A1144/91/BSS/VNP

of management The respondent No 1 is said to have directed the respondent No 2 on 19 4-1984 not to interfere with the proceedings of election of the committee of management which was going to be held under the rules of the institution The election is said to have been held on 5 5 1986 in which one Nagendra Sharma, who is writ petitioner, is said to have been elected as Manager and Sobhnath Tewari as president of the managing committee of the institution Information of this election was sent to respondent No 2 for the purpose of payment of salary to the staff of the institution The respondent No 4 is said to have set up a dispute in which he alleged that he was a representative of the rival managing committee The petitioners committee has come into picture according to the petitioner on 5 5 1986 The rival managing committee is said to have never functioned The petitioner's committee was functioning and managing the affairs of the institution and has been in possession and effective control of finances, assets and properties of the institution

3 The officer of the respondent No 2 is said to have tried to create hindrance in the election A representation was made by the members of the committee of management of the institution functioning at that time for not appointing Prabandh Sanchalak authorised controller In the representation it was stated that let the election process be completed according to the schedule already published the then Manager is also said to have made a representation dated 1 3 1986 to the respondents Nos 1 and 2 for permission to hold election of the committee of management The opposite party No 1 is said to have directed opposite party No 2 not to interfere with the election of the committee to be held according to the schedule published in Hindi daily 'Aaj' The opposite party No 2 is said to have accepted the result of the election held on 5 5 1986 in respect of the committee of management The signatures of the manager of the petitioner's committee were also attested on 7 5 1986 The charge of the managing committee was handed over to the petitioner's committee on 7 5 1986 Thereafter salaries of the teachers were paid for two months under the joint signatures of Nagendra Sharma Manager and the Accounts Officer The petitioner has tried to set up a case to prove that he was in effective control of the finances and affairs of the committee of management.

4 The respondent No 4 is said to have filed writ petition No 8045 of 1986 through one Chandresh Singh for quashing the order whereby the signatures of the petitioner were attested The order dated 7 5 1986 was stayed Another interim order was passed on 4-7 1987 by the High Court after filing of a detailed counter affidavit and stay vacation application to the effect that the management of the institution shall continue to be run by the office bearers as on June 17 1986 The said writ petition was dismissed as not pressed and a liberty was given to file a representation under S 16A(7) of the U P Intermediate Education Act The respondent No 4 did not file any writ petition His application for impleadment was also dismissed on 27 10-1987

5 On 28 10 1986 a representation was filed by the respondent No 4 under S 16A(7) of the U P Intermediate Education Act The petitioner filed a reply to the said representation The petitioner's committee on 23 7 1987 also filed a representation before the respondent No 1 asking him to reject the representation of the respondent No 4 and granting recognition to the petitioner's committee on the basis of its effective control over the affairs of the institution The petitioner is also said to have assisted the auditors in auditing the previous accounts of the institution which has remained unaudited The respondent No 1 is said to have passed an order dated 31 7 1987 appointing Prabandh Sanchalak of the institution and asking him to hold election thereafter The scheme of administration which was amended, had no retrospective effect, therefore, the Prabandh Sanchalak could not be appointed The finding that the previous managing committee which conducted election had become dead

and defunct on 18 1 1986 is said to be arbitrary mala fide and without jurisdiction The process of election commenced under the orders of the opposite party No 1 and election was duly held by the previous committee of management The membership fee was only Rs 100/ which was arbitrarily enhanced to Rs 500/ by the opposite party No 1 without having any jurisdiction in this regard The opposite party No 1 could not exercise any jurisdiction over the society under the Societies Registration Act The valid election of 5 5 86 could not be set aside by the respondent No 1 The impugned order is said to be misconceived and arbitrary The petitioner s committee has been in effective control of the management There is no provision in the scheme of administration for appointment of Prabandh Sanchalak A validly elected committee was functioning The finding about the previous managing committee having become defunct on 18 1 1986 is without jurisdiction, arbitrary and mala fide The increase in the membership fee is also said to be arbitrary The respondent No 1 cannot set aside the election The election of the petitioner's committee can be challenged only by filing a civil suit by a rival committee

6 On the aforesaid grounds it is prayed that the order dated 31 7 1987, contained in Annexure XXVII to the writ petition be set aside by a writ of mandamus the respondents be directed not to act upon or enforce the impugned order and the respondents be prohibited from interfering with the functioning of the petitioner's committee

7 In the counter affidavit the respondent's case is that the election held on 19 12 1982 was valid but the managing committee elected in pursuance of the said election could not remain in office beyond three years and one month According to the respondents the managing committee elected on 19 12 1982 did not exist after three years and one month after the said date It is contended that the managing committee elected in the said election became defunct on 18 1 1986 Therefore the election conducted by the said managing committee on 5 5 1986 was invalid and without jurisdiction The petitioner could not therefore claim to be a managing committee constituted in an election which could not be held by the said managing committee The election could be held by the authorised controller It is also contended that the managing committee of respondent No 4 was also election on 5 5 1986 That managing committee was valid The matter was referred to the Deputy Director of Education because two rival committees were in existence The Deputy Director of Education had the authority under S 16A(7) to consider the validity of the election which was held on 5 5-1986 and also be appoint a Prabandh Sanchalak for initiating election process and for conducting the election for the managing committee of the institution The petitioner s claim set out in the writ petition is denied and the impugned order is said to be valid and justified A long list of annexures is appended to the writ petition and to the counter affidavit and the rival contenders have tried to justify their stand and placed their own construction on the provisions of the Intermediate Education Act The respondents have also denied that the petitioner was ever in effective control of the institution The effective control, which is to be determined under the provisions of S 16A(7) of the Act, is to be determined on the relevant date which in the present case is 5 5 1986 and prior to that

8. Further supplementary affidavits and pleadings have been filed. It is contended that the scheme of administration was amended with effect from 31 1 1985 Under the amended scheme election of the committee of management was to be held immediately after the expiry of three years and one month and if the same was not done, Prabandh Sanchalak was to be appointed, who would conduct election of the committee of management Under the unamended scheme which was in force when election on 19 12 1982 was held it was provided that the committee of management shall remain in

office for three years or till the election for constituting a new managing committee was held The respondents submit that the period for continuation of the old managing committee beyond three years and one month was against the provisions of law, therefore it would not operate in respect of an election which was to be conducted after the amendment i e after 31 1 1985 The petitioner, however has contended that the amended provisions would not apply to the term of managing committee which was constituted in 1982 and which had a right to exist till new election was conducted The amended provisions would apply prospectively in respect of those committees which were constituted after 31st January, 1985 and not in respect of those managing committees which were in existence on the date of coming into force of the amended scheme

9 Learend counsel for the parties submitted detailed arguments They referred to various annexures and pleadings which they have submitted in support of their contentions Some authorities also were cited at the Bar

10 I have considered the arguments and given thoughful considerations to the submissions made by the learned counsel for the parties and examined the record of the writ petition

11 There is no dispute with regard to the election held for the managing committee on 19 12 1982 That election was held under the provisions of old scheme which permitted the managing committee to remain in office till fresh election was held and bar of the three years and one month for remaining in office for the elected managing committee was not there It was not imperative under the old scheme to appoint a Prabandh Sanchalak after the expiry of three years and one month from the date of election of the managing committee, if no election was held within that period.

12 The facts which emerge from the present writ petition are that within three years from the date of expiry of the term of the managing committee which had come into office on 19 12 1982 election process were initiated on 15 11 1985 The election was to be completed by 15 1 1986 In the meantime an order was received from the District Inspector of Schools on 27 12 1985 virtually staying the process of election and asking the then managing committee to proceed in accordance with the amended scheme in the matter of conduct of election The managing committee had proceeded in the matter in accordance with the old scheme, therefore, the purport of the communication dated 27 12 1986 was not to proceed with the process of election As a result of this no election could be conducted by the managing committee on the due date i e before the expiry of the terms of its office Thereupon the Deputy Director was approached He is said to have looked into the matter and directed by his order dated 19 4 1986 to complete the electionprocess which were started in November 1985 The election was conducted on 5 5 1986 and the signatures of the Manager of the Managing Committee were attested on 7 5 1986 On this point it is relevant to mention that a writ petition was filed in the High Court against the attestation of signatures of the Manager of the petitioner's committee which was dismissed as the respondent wanted to file a representation before the Deputy Director under Section 16A(7) of the Intermediate Education Act

13 With regard to the election of 19 12 1982 of the then committee of management of dispute was raised by the rival committee which was decided by the Deputy Director and the said managing committee was granted recognition on 20 4 1984 The said managing committee would, therefore, be deemed to have come into existence either on 20 4 1984 or 19 12 1982 This question will be taken up for discussion at a little later

14 The dispute regarding election of 5 5 1986 was considered by the Deputy Director on a representation filed by the respondent No 4 The Deputy Director held the election of 5-5-1986 invalid and appointed authorised controller for a fixed term with a direction to him to hold the election of the managing committee The petitioner has submitted that the Deputy Director has not discharged his obligations in accordance with Section 16A(7) of the Act Section 16A(7) reads as under

"Section 16A(7) Whenever there is dispute with respect to the Management of an institution persons found by the Regional Deputy Director of Education upon such enquiry as is deemed fit, to be in actual control of its affair may for purposes of this Act, be recognised to constitute the committee of management of such institution until a Court of competent jurisdiction direct otherwise

Provided that the Regional Deputy Director of Education shall, before making an order under this sub-section, afford reasonable opportunity to the rival claimants to make representations in writing

Explanation — In determining the question as to who is in actual control of the affairs of the institution, the Regional Deputy Director of Education shall have regard to the control over the funds of the institution and over the administration, the receipt of income from its properties, the scheme of Administration approved under sub section (5) and other relevant circumstances "

It is submitted that on the true construction of Section 16A(7) of the Act the Deputy Director of Education has to give a finding upon such enquiry as is deemed fit by him in respect of the fact as to which is the validly constituted committee of management which can be recognised as such, until a Court of competent jurisdiction directs otherwise In [illegible] is decision the Deputy Director [illegible] is enjoined to give reasonable opportunity to the rival claimant to make a representation in writing In determining as to who is in actual control of the affairs of the institution the Deputy Director is to have regard to the control over the funds of the institution and over the administration and the receipt of income from the properties of the institution, the Scheme of Administration approved under sub section (5) and other relevant circumstances

15 It is borne out from the examination of the impugned order of the Deputy Director of Education that he has not at all given a finding as to which of the rival committees on the relevant date was in effective control of the institution Giving of finding on this issue is a condition precedent for according the recognition to one of these managing committee

16 The managing committee represented by the respondent No 4 also had claimed that he represented the managing committee the election whereof was held on 5 5-1986 Strangely enough the respondent No 4 wanted the Deputy Director of Education to give recognition to the election of his committee which he claimed to have taken place on 5 5 1986 and in the same breath pleaded that no election could be held on that date because the term of the managing committee had expired The respondent No 4 has approbated and reprobated in the same breath The Deputy Director of Education gave a finding that the election alleged to have taken place on 5 5 1986 was invalid and Prabandh Sanchalak was appointed by him He, therefore, omitted to do what was required to be done by him under law The questions for consideration are whether the old managing committee constituted on 19-12 1982 which was recognised on 20-4-1984 could conduct the election on 5 5 1986 and whether the order of the Deputy Director appointing Prabandh Sanchalak without complying with the provisions of Section 16A(7) of the Act is valid The committee of management constituted on 19 12 1982 was recognised on 20 4 1984 There is ample proof that the said committee had taken the management of the institution on 19 12 1982 though it got recognition on 20 4 1984 Its term would not start from 20 4-1984 as is contended, but will commence from the date of its taking over the affairs of the institution Therefore, the managing committee constituted on 19-12 1982 could not be said to have taken over management on 20 4-1984 as was sought to be canvassed by the learned counsel for the petitioner According to the learned counsel for the petitioner its term would expire on 20-

4-1987 and thereafter it can remain in office for one month more The true position is that it has come into being on 19 12 1982 because its functioning was not stalled Only there was delay in its recognition The submission that the committee elected on 19 12 1982 would last up to 20 4 1987 is, therefore without merit

17 In order to determine the term of the committee of management constituted on 19 12 1982 it is necessary to say something about the amendment in the scheme of administration The scheme of administration had undergone a change with effect from 31 1 1985 and from that date it was provided that the term of the managing committee will be three years and one month and if the election is not held within that period a Prabandh Sanchalak can be appointed to hold election of the committee of management Under the unamended scheme this provision was not there The managing committee of 1982 had come into being under the old scheme Therefore, it had the right to remain in office till election for constituting the new committee of management was held The amendment effected on 31 1 1985 would not detract the authority of the managing committee of 1982 to conduct the election of the new managing committee after the expiry of its term The old scheme did not envisage appointment of Prabandh Sanchalak immediately at the expiry of three years and one month The authority which was given to the managing committee under the unamended scheme, therefore, would not be taken away by the amendment which was effected on 31 1 1985 The said provision was prospective and not retrospective It would apply to such managing committee which had come into office after 31 1 1985 and would not be made applicable retrospectively to the managing committee constituted on 19 12 1982 That being so, the managing committee constituted in 1982 cannot be deprived of its authority given to it in respect of conduct of election under the unamended scheme

18 Assuming, and not deciding that the amendment of the scheme of administration was applicable to the petitioner s managing committee it would not make any difference on the rights of the petitioner s managing committee which came into being on 5 5 1986 The term of the old managing committee would expire on 19 12 1985 It could remain in office for one month thereafter It would cease to be operative from 18 1 1986 onwards It initiated election process on 15 11 1985 and the election was to take place on 15 1 1986 i e before the expiry of a period of three years and one month The District Inspector of Schools stopped the process of election by his communication dated 27 12 1985 The election process could not be completed on 15 1 1986 because the District Inspector of School's communication When the matter was referred to the Deputy Director of Education he after looking into the matter lifted the embargo on 19 4 1986 placed on the conduct of the election by the District Inspector of Schools and directed the election to be conducted which was conducted on 5 5 1986 in the said election the petitioner s committee came into being and the respondent No 4 set up a rival managing committee and contended that they were also elected on the same date The election was postponed and thereafter allowed to be held by the respondents No fault can be attributed to the petitioner for not holding the election before the expiry of three years and one month In fact they had initiated the process and fixed the schedule for conduct of the election That being so it cannot be said that the period between 15 1 1986 and the actual date of election i e 5 5 1986 is unaccounted for The said period is accounted for The election is stopped, then it is permitted to be held Therefore the amendment in the scheme of administration has no relevance so far the conduct of election dated 5 5 1986 is concerned

19 The signatures of the manager are attested on 7 5 1986 The writ petition is filed in the High Court against this order, which is dismissed A representation is made to the Director of Education who oversteps his jurisdiction and passes an order which cannot be supported under Section 16A(7) of the Act

20 It was contended by the learned counsel for the respondent that though the Deputy Director of Education has not given a finding as to which of the rival claimants was in effective control on the relevant date but his order of appointment of authorised controller secures the ends of justice and he has directed him to conduct the election which will satisfy the demands of the petitioner also It is stated that the validity or otherwise of the election can be considered under Section 16A(7) of the Act by the Deputy Director of Education while giving his findings If he is to decide which of the rival committees is in effective control he has to give a finding of the election also

21 The submission of Mr Ashok Bhushan that the Deputy Director of Education can consider the validity of the election or otherwise appears to be correct but could the Deputy Director of Education go beyond that as he has gone in the present case ? Mr Ashok Bhushan submitted that technically he may not be correct in appointing the authorised controller but his order was equitable and just Reference is made to the case of Committee of Management of Kishan Uchchatar Madhyamik Vidyalaya v Deputy Director of Education, Meerut, reported in 1986 All LJ 88 which says that the order of appointment of the authorised controller was valid where new scheme of administration for an institution was framed providing that the committee of management would cease to exist on expiry of certain term and the Deputy Director would appoint an administrator for non election of new committee within prescribed period for holding election for constituting new committee of management In the case of Committee of Management of Subhash Uchchatar Madhyamik Vidyalaya, Rajapura (Mowana) Meerut v Deputy Director of Education, Meerut reported in 1985 UPLBEC 241 (1985 All CJ 1005), it was held that the Deputy Director of Education cannot go into the disputed question of validity of election of committee of management under Section 16A(7), except incidently with a view to decide the question of effective control of the rival claimants over the affairs of the management of the institution In the case of Sankatha Prasad Srivastava v Deputy Director of Education Gorakhpur reported in 1985 UPLBEC 751 (1985 All LJ 1289) it was held that the order passed by the Deputy Director of Education in exercise of powers, vested in him without considering the question of effective control and holding of election would be bad In the case of Maharshi Sukhdeo Vidyalaya Shukartal v Regional Deputy Director of Education Ist Region (D D R) Meerut reported in 1985 All LJ 471 the jurisdiction of the Deputy Director and scope of his exercise was considered It was held that the Deputy Director has no jurisdiction to decide the validity of election of rival managing committee In the case of Bajaj Shiksha Parishad v Deputy Director of Education reported in 1988 UPLBEC 267 the Supreme Court has held that the direction of the Deputy Director under Section 16A(7) of the Act to hold election before the expiry of the term of the elected committee of management which was in actual control of the affairs of the college was held to be illegal and without jurisdiction The term of the committee of management in actual control of the institution cannot be curtailed However in the case of Committee of Management, Bhakt Vishal Inter College Bichwa District Mainpuri v Regional Deputy Director of Education, Agra reported in 1988 UPLBEC 402 (1988 All LJ 1023) it was held that where there is a dispute between the two rival groups about the management of an institution the issue of actual control is inextricably mixed up with the validity of election The Deputy Director has jurisdiction to examine the validity of election also In the case of Salek Chand Chauhan v State of U P reported in 1988 UPLBEC 585 (1988 All LJ 687) it was held that clause 8 of the Scheme of administration fixes a certain term for the members of the committee of management which is three years and provides that they may continue in office for only one more month after expiry of their term of three years and thereafter they cease to hold office The Deputy Director was to appoint Pradhan Sanchalak, who was to take over the management and hold election Clause 8 of the Scheme of Administration was held to have no effect on clause 9(1) of the Scheme of Administration which provided that the manager and president can jointly convene a meeting of the general body to hold election and the notice for meeting can be jointly signed by both of them The District Inspector of Schools in such circumstances was held to be entitled to issue directions to hold election in accordance with clause 9 of the Scheme In the case of Committee of Management of Hindu Inter College, Kosi Kalan v Regional Deputy Director of Education, Agra Region, Agra, reported in 1988 UPLBEC 732 (1988 All LJ 831), the Court was considering the import of Section 16A(7) of the Intermediate Education Act, Section 25(3) of the Societies Registration Act and Section 115 of the Evidence Act The dispute relating to between the two rival groups, each group claiming to have been elected in accordance with the scheme of administration was before the Deputy Director The Director of Education gave recognition to one of those groups He was held to have jurisdiction to do so and his judgment was subject to the decision of a civil suit which could be filed by the aggrieved party In the case of Management Committee of the Arya Kanya Inter College, Islamnagar, Budaun v Deputy Director of Education IIIrd Division, Bareilly reported in 1983 Education Cases 244, a Division Bench of this Court was considering Section 16A(7) of the Intermediate Education Act The dispute with regard to the validity of two elections held for management of rival committee which was referred to the Deputy Director of Education could be decided by him and such a dispute was within the ambit of his jurisdiction

22. There is no power vested in the Deputy Director of Education to appoint authorised controller under Section 16A(7) of the Intermediate Education Act The Deputy Director of Education cannot grant recognition to one of the rival committees without considering the question of which of the rival committees was in effective control of the institution on the relevant date The Deputy Director has failed to decide that question in the present case He could decide as to which of the rival committees was validly elected He could not annul the elections of both the rival committees The power to annul the election of the two rival committees is not given to the Deputy Director of Education by the provisions of Section 16A(7) of the Act He could, of course, recognise one of the committees after having considered the question of effective control over the management He was not considering an election petition which would empower him to annul the election in toto The course adopted by the Deputy Director is not legal and he has overstepped his jurisdiction and exercised powers which were not vested in him While deciding the question of recognition he had, of course, the power to consider the validity of election incidently He cannot undo an election completely and then appoint an authorised controller under Section 16A(7) It was feebly argued that he was considering the scheme of administration which permitted him to appoint authorised controller The dispute was referred to him under Section 16A(7) of the Act, which did not permit him to appoint the authorised controller

23 The impugned order, contained in Annexure XXVII to the writ petition, is therefore without jurisdiction, illegal and violative of Section 16A(7) of the Act The said order cannot be sustained and is to be quashed

24 By the order dated 31 7 1987 the Deputy Director of Education has cut short the term of the committee of management by some months The committee of management could remain in office for three years and one month under the amended scheme also

Its term would end on 4-6 1989 If within that period no election was held the Deputy Director was empowered to appoint authorised controller to take over the management and to hold election, but the Deputy Director without jurisdiction appointed the authorised controller on 31 7 1987 when the term of the committee of management had not expired By the impugned order the term of the committee of management of the petitioner is reduced in violation of law and against the provisions of the scheme of administration There has been reduction of about 23 months in the term of the petitioner's managing committee and the reduction is effected by the impugned order which is held to be without jurisdiction and violative of law Therefore, the petitioner is entitled to get benefit of 23 months from the date the authorised controller hands over charge to the petitioner

25 The writ petition filed by the respondent No 4 against the order of attestation of signatures was dismissed as not pressed, therefore, the attestation of the signatures of the manager of the petitioner's managing committee has become final That would mean that the election dated 5 5 1986 set up by the petitioner has acquired validity, and the petitioner is entitled to manage the affairs of the committee of management for three years and one month Its term has been cut short by 23 months, credit whereof is to be given to the petitioner because he cannot be deprived of full terms on the basis of an order which is without jurisdiction

26 Mr Ashok Bhushan argued that assuming that the petitioner was elected in the election held on 5 5 1986, his term would expire on 4-5 1989 and he can get only one month thereafter That would allow him to remain in office up to 4 6 1989 Now the term of the committee of management of the petitioner has already expired, therefore, the authorised controller may be directed to hold election immediately so that new committee of management is elected

27 This argument on the face of it appears to be attractive but when a deep thought is given to the submission it would appear that Mr Ashok Bhushan wants the order dated 31 7 1987 to be construed as a valid order which has not affected the right of the petitioner to management the affairs of the committee of management. He submitted that once the term has started, it would not stop even if by some events which had intervened the term was cut short Therefore, the order of the Deputy Director of Education would not have the effect of reducing the period, of the petitioner's managing committee I am not inclined to agree with Mr Ashok Bhushan because on the basis of the impugned order, which is without jurisdiction the petitioner will not be allowed to lose about 23 months of his term the term of the petitioner's managing committee was reduced for no fault of his and on the basis of an order, which is held to be bad Therefore the commencement of term of a managing committee cannot be compared to the commencement of limitation for seeking a remedy on a court of law If the limitation for pursuing a remedy starts it does not get suspended by any event This principle cannot be applied to the period of term for which the petitioner's committee has to exercise powers of management over the affairs of the institution The submission is, therefore, rejected

28 Viewed from any angle the order dated 31-7 1987 cannot be sustained The said order for the reasons given in this judgment is hereby quashed as being without jurisdiction and contrary to the provisions of law It is held that the petitioner's managing committee is entitled to manage the affairs of the institution for full term of three years and one month out of which about 23 months have been reduced by the invalid impugned order Therefore, the petitioner is to be given benefit for the remaining period of about 23 months to be calculated by the Deputy Director of Education in exact terms The petitioner is, therefore, entitled to remain in charge of the management of the institution for about 23 months or so from the date of obtaining charge of the management from the authorised controller The authorised controller is commanded to handover the charge of the management to the petitioner's committee within one week from the date of presentation or a certified copy of this order before him The petitioner has the authority to conduct the election in accordance with the scheme of administration amended on 31 1 1985 after the expiry of term of his remaining period If he fails to do so, the Deputy Director of Education will be within his right to handover the management to the authorised controller with the direction that the said authorised controller will hold the election within three months and hand over the management of the institution to the duly elected committee of management.

29 With the observations made in this judgment the writ petition is allowed but there will be no order as to costs

Petition allowed

1991 ALL L J 1092

PALOK BASU, J

Ram Murat, Petitioner v District & Sessions Judge Allahabad and others Respondents

Civil Misc Writ Petn No 17361 of 1991, D/ 30 8 1991

Civil P C (1908), O 5, R 15 — U P Panchayat Raj Act (26 of 1947), S 110 — U P Panchayat Raj Rules (1947), R 24(2) — Exparte order of S.D O setting aside election of petitioner as Village Pradhan — Notice of election petition served on adult member of Pradhan's family in his absence when anybody with least effort certainly would have found him and served notice on him — Mere finding by election Tribunal in exparte order that notice was served upon adult member of the elected Pradhan's family was not a sufficient proof of compliance with provisions R. 24(2) of the Rules and O 5, R 15 of C P C. — Ex parte order was liable to be set aside

(Paras 10, 11)

H N Singh, for Petitioner, Standing Counsel, for Respondents

ORDER :— Ram Murat Yadav has filed this writ petition challenging the order of the S D O Phulpur (Election Tribunal), dated 19 12 1989 whereby he decided an election petition exparte, setting aside the election of the petitioner as Pradhan of village Bhadkar, Tehsil Phulpur, district Allahabad This order has been upheld in revision by the District Judge, Allahabad on 23 5 1991

2 It may be relevant to mention here that after having come to know of the ex parte order passed by the Sub-Divisional Officer as mentioned above, the petitioner moved an application for restoration before the S D O The said restoration application was also dismissed on 21 5 1990 This order was also subject matter of challenge before the District Judge in a connected Revision Ultimately by the order dated 23 5 1991, the District Judge has dismissed the two Revisions, upheld the two orders of the S D O and has, therefore, put the seal of his approval to the ex parte order as well as to the order dismissing the restoration application, hence this writ petition

3 At the time of admission notice was issued to the opposite parties and an interim order was granted on 25-6 1991 to the effect that if charge of the post of Pradhan has already not been taken over from the petitioner, he would continue till 8th of July, 1991 In the meantime the contesting opposite party No 3, namely, Banwari Lal, who was the election petitioner before the S D O has put in appearance through Sri C K Rai, Advocate He has filed a counter affidavit Rejoinder Affidavit is also filed Shri Kaushlendra Singh Chauhan, learned Standing Counsel has espoused the cause of the State

4 The short question involved for decision in this writ petition for the time being is as to whether the service on the petitioner of the election petition filed by the opposite party No 3 was proper and in accordance with law or not It is not disputed, rather a categorical finding has been recorded to this effect that the notice of the election

petition was served upon the uncle of the petitioner in his village

5 On the question of service two arguments have been advanced by the learned counsel for the petitioner Firstly the uncle of the petitioner is living separately and that he is on inimical terms with him Secondly, it is not expected that the petitioner who was an elected Pradhan should be taken to be absent or continue to be absent for a reasonable length of time so as to make it incumbent upon the process server to serve the notice upon his uncle

6 In reply of Sri C K Rai, the learned counsel for the opposite party as also of the Standing Counsel is that since Order V Rule 15 C P C is applicable to election petitions arising out of Panchayat Raj Act it was a proper service on the petitioner if an adult member of his family had been served with the notice

7 The controversy having thus been narrowed down to the simple question as to whether on the facts of the present case the service on the uncle of the petitioner can be taken to be a service on the petitioner, a look may be had at Order V, Rule 15, C P C which reads as under —

> "Where service may be on an adult member of defendant s family
>
> Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at this residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him
>
> Explanation — A servant is not a member of the family within the meaning of this rule "

8 It is inherent in the said provision that it is only when the process server is of opinion that 'there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of summons on his behalf that the service can be effected on another adult member of the family who is residing with the defendant

9 It is obvious that the person to be adversely affected in an election petition is the person elected No other person will be seriously concerned with such a litigation than the elected citizen Thus the Legislature in sub-rule (2) of Rule 24 framed under the Panchayat Raj Act has provided as under —

> 24(2) The person whose election is questioned and where the petition claims that the petitioner or any other candidate shall be declared elected in the room and place of such person every unsuccessful candidate shall be made a respondent to the application '

10 Serious repercussions are attached to such proceedings which are initiated by way of election petition challenging the duly elected persons to respectable offices such as Pradhan of a village Consequently strict compliance with the rule of service is necessitated The authorities below shall do well to ensure that the purpose of the law is carried to the logical end and that no slipshod method is adopted allegedly to fulfil the material requirements of law Under the circumstances a mere observation in the ex parte order by the Election Tribunal that the notice has been served upon an adult member of the elected Pradhan may not be enough proof of complying with Rule 24(2) of Panchayat Raj Rules and Order V, Rule 15 C P C quoted above It appears desirable to insist that a categorical finding be recorded by the Tribunal that the contingencies contemplated by Order V, Rule 15 C P C existed and they have been fully obeyed by the process server when alone the Tribunal may be entitled under the law to proceed ex parte

11 Admittedly the petitioner was at the time of filing of the election petition a sitting Pradhan of the village It is unreasonable to argue that he would not be available in the

village 'for a reasonable length of time' Anybody making the least effort certainly would have found his and served the notice on him Under the circumstances the allegation of the petitioner that the service effected on his uncle cannot be taken to be a proper service on him has to be accepted In view of the aforesaid discussion this petition should succeed as the three impugned orders suffer from errors apparent on the face of the record

12. Sri Hari Narain Singh, learned counsel for the petitioner and Sri C K Rai, learned counsel for the opposite parties are agreed that the matter being of extreme urgency requires expeditious decision by the Tribunal Sri Hari Narain Singh has made a statement on behalf of his client that the date fixed by this court shall be taken to be sufficient information to his client and he will present himself before the S D O , Phulpur, on the said date

13 In view of what has been discussed above, this writ petition is allowed The orders dated 19 12 1989 and 21 5 1990 passed by the S D O , Phulpur, Allahabad, and 25 5 1991 passed by the District Judge, Allahabad in Revisions Nos 151 of 1990 and 152 of 1990 under the Panchayat Raj Act are quashed The petitioner will present himself before the S D O , Phulpur, on 10th September, 1991 The election petition filed by Banwari Lal, respondent No 3, shall be restored to its original number and decided on merits according to law within a period of three months from 10th September, 1991 Costs easy

14 A copy of this order may be furnished to the learned counsel for the parties on payment of usual charges by 4th September, 1991

Petition allowed

1991 ALL L J 1094

M P SINGH, J

Har Swaroop Sharma, Petitioner v Zila Panchayat Raj Adhikari, Aligarh and another, Respondents

Civil Misc Writ Petn No 25901 of 1991, D/ 13 9 1991

U P Panchayat Raj Act (26 of 1947), S 14 – U P Panchayat Raj Rules (1947), S 33B – Removal of Pradhan – No-confidence motion – Adjournment of Scheduled meeting – Notice to Pradhan – 5 days prior notice fixing date of subsequent meeting was given to Pradhan – Notice was not in accordance with law – Notice invalid and was liable to be quashed

Section 14 contemplates that at least 15 days previous notice shall be given before convening the meeting for consideration of no confidence motion Applying the said provision of the Act to the present case after the meeting was adjourned the fresh notice was issued to Pradhan just days prior to the fixing of subsequent meeting Thus fifteen days' clear notice which is mandatory has not been given to the Pradhan such notice was invalid and no motion of confidence can be carried out on the basis of the same Five days prior notice given to Pradhan was not in accordance with the law Notice invalid and was liable to be quashed

(Paras 11, 15)

Cases Referred Chronological	Paras
1986 All LJ 1456 1986 All CJ 617	12

S D Singh, for Petitioner, Standing Counsel for Respondents

ORDER – The petitioner has challenged the validity of the notice on the basis of which no confidence motion is to be convened on 15th September, 1991

2 The petitioner was elected as pradhan in the 1988 and since then he has been functioning

JI/KI/A1102/91/KJK

3 On 12th August, 1991 five members of the Goan Sabha, Sathni singned a notice as required under S 14 of the Panchayat Raj Act read with Rule 33B of the Rules framed thereunder and delivered the same to the prescribed Authority

4 On the same day the prescribed Authority passed an order fixing 9th September, 1991 for considering the motion of no-confidence

5 The meeting scheduled to be held on 9th September, 1991 was adjourned on account of law and order situation But the next date was not fixed

6. On 10th September, 1991 the District Panchayat Officer issued a fresh notice fixing 15th September, 1991 for considering the motion of no confidence

7 The question to be considered is whether the meeting scheduled to be held on 15th September will be in accordance with law and the notice dated 10 9 1991 is valid

8 Section 14 of the Panchayat Raj Act reads as under —

"14 Removal of pradhan or up Pradhan

1 The Gram Sabha may, at a meeting specially convened for the purpose of which at least 15 days' previous notice shall be given, remove the pradhan by a majority of two-third of the members present and voting

2 A meeting for the removal of a pradhan shall not be convened within one year of his election

3 If the motion is not taken up for want of quorum or fails for lack of requisite majority at the meeting, no subsequent meeting for the removal of the same pradhan shall be convened within a year of the date of the previous meeting

4 Subject to the provisions of this section, the procedure for the removal of a pradhan, including that to be followed at such meeting, shall be such as may be prescribed "

9-10 This section empowers the Gaon Sabha to remove the pradhan or uppradhan, if the motion is carried on by a majority of two third of the members This court has to examine the scope of '15 days previous notice '

11 There is no dispute that the provisions of S 14 are mandatory in nature Non-compliance of the rigid conditions will invalidate the meeting This Section contemplates that at least 15 days previous notice shall be given before convening the meeting for consideration of no confidence motion The pharase' at least 15 days previous notice shall be given excludes the date of the notice and the date of the proposed meeting,

12 In the case of Yadunath Pandey v District Panchayat Raj Officer 1986 All CJ 617 (1986 All LJ 1456) a Division Bench of this Court has held that while calculating the period of fifteen days both first and last dates have to be excluded S 14 provides that there should be 15 days clear notice and Rule 33 provides that the prescribed Authority shall convene a meeting of the Gaon Sabha under S 14 of the Act on a date to be fixed by him which shall not be later than thirty days from the date of the receipt of the notice

13. Rule 33B prescribes the procedure to be followed for removal of the pradhan or Up-pradhan It provides that a written notice of the intention to move a motion for removal of a pradhan under S 14 of the Act shall be necessary It shall be signed by not less than half of the total number of the members of the Gaon Sabha and shall state the reasons for moving the motion and it shall be delivered in person at least by five members signing the notice to the prescribed Authority

14 The prescribed Authority shall thereafter fix a date which shall not be later than thirty days from the receipt of the notice

15 Applying the said provision of the Act to the present case after the meeting was adjourned on 5th September, 1991 fresh notice was issued on 10th September, 1991, fixing 15th September 1991 Thus fifteen days clear

notice has not been given to the petitioner Accordingly the notice is invalid and no motion of no confidence can be carried out on the basis of the same

16 After hearing the learned counsel for the petitioner and the learned Standing Counsel I am satisfied that the meeting for considering the motion of no confidence which is scheduled to be held on 15th September 1991 on the basis of the notice dated 10th September 1991 is not in accordance with law Notice dated 10th September 1991 itself is invalid and accordingly it is quashed

17 With the result the writ petition succeeds and is allowed The notice dated 10 9 1991 is invalid

Petition allowed

1991 ALL L J 1096

S D AGARWALA AND
S C VERMA JJ

Om Prakash Rajpoot Petitioner v State of U P and others Respondents

Civil Misc Writ Petn No 20159 of 1990 D/ 23 9 1991

Constitution of India, Art 226 — Auction — Collection of rolls of bridge — Settlement of right — Pre-condition of submitting solvency certificate on basis of cash and immovable properties and duly certified by District Magistrate — Mandatory — Non compliance resulting in not permitting petitioner to participate in auction — Is legal

Contract Act (9 of 1872), S 2(a)

(Para 7)

Askok Khare for Petitioner, Standing Counsel for Respondents

S D AGARWALA, J — This is a petition under Art 226 of the Constitution of India Since the counter affidavit and rejoinder affidavits have been exchanged parties are agreed that the petition may be disposed of finally

2 We have heard learned counsel for the parties

3 On 19 6 1990 an auction notice was issued by the Executive Engineer Public Works Department Hamirpur for settlement of right to collect tolls of bridge Sanjay Setu' situate at 65 Kilometer on Kanpur Hamirpur Kabrai Marg The settlement was to be made for a period of one year and the auction was scheduled to be held on 31st July 1990 Under the terms of the auction notice every bidder at the said auction had to submit certain documents and then only he was to be permitted to take part in the auction One of the important documents was a solvency certificate for a sum of Rs 25,00,000/ It provided in the auction notice that in case the solvency certificate was not submitted in accordance with the terms of the auction notice then such person will not be permitted to bid at the auction

4 The petitioner submitted a solvency certificate on 24 7 1990 On 31 7 1990 the Executive Engineer, Public Works Department, Hamirpur notified the list of persons permitted to participate in the auction as also a list of persons excluded from participating in the auction Petitioner made an enquiry as to why he was not permitted to participate in the auction The petitioner was informed that since the solvency certificate submitted by the petitioner was on the basis of movable and immovable property, the same was not in accordance with the condition No 2 of the auction notice and consequently the solvency certificate was not a valid certificate and as such the petitioner was not permitted to participate in the auction

5 On 31 7 1990 auction was held Prithviraj Singh gave highest bid for a sum of Rs 21,15,000/ The second bidder was Munindra Nath Upadhyaya who gave bid for Rs 21,13,000/ These were only two bidders at the auction Since the petitioner was not permitted to participate in the auction petitioner filed the present petition challenging the auction proceeding held on 31 7 1990

6 Learned counsel for the petitioner has contended that the Excutive Engineer, Public Works Department, Hamirpur acted illegally in exercise of his jurisdiction in refusing to permit the petitioner to participate in the auction His contention is that the solvency certificate submitted by him was a valid certificate in accordance with the auction notice and consequently the proceedings of the auction held on 31 7 1990 are liable to be quashed

7 Copy of the auction notice has been attached as Annexure 3' to this petition Cl 2 which is relevant for the purposes of decision in this petition is quoted below

"2 प्रत्येक बिडर को उपरोक्त कार्य हेतु अपनी हैसियत प्रमाण पत्र देना होगा जिसमे नगद एवं अचल सम्पति का विवरण दिया जायेगा जो कि सजय सेतु हेतु 25,00000 00 पचीस लाख से कम का न होगा । प्रस्तुत किये गये हैसियत प्रमाण पत्र से अधिक बोली मान्य नही होगी । यदि हैसियत प्रमाण पत्र से अधिक बोली ठेकेदार बोलता है तो उसे उतनी हैसियत का प्रमाण पत्र बोली बोलने के 15 दिन के अन्दर प्रस्तुत करना होगा अन्यथा उसकी धरोहर धनराशि जप्त करने का अधिकार सरकार को होगा । फर्म की स्थिति मे हैसियत प्रमाण पत्र फर्म के नाम प्रस्तुत करना होगा । फर्म के अलग अलग साझीदारो का हैसियत प्रमाण पत्र मान्य नही होगा । हैसियत प्रमाण पत्र के साथ आयकर अधिकारी का अदेय प्रमाण पत्र को ड्यूज सर्टीफिकेट प्रस्तुत करना अनिवार्य है । यह हैसियत प्रमाण पत्र अपने जिले के जिलाधिकारी से मूल रूप मे प्रस्तुत करना होगा जो कि कार्यालय मे जमा रहेंगे । बोली स्वीकृति न होने की दशा मे वैधता समाप्त होने पर ही वापिस किये जा सकते है ।"

The above clause (2) of the notice clearly provides that every bidder shall have to submit a solvency certificate for a sum of rupees twenty five lacs in respect of his cash and immovable property This certificate has to be issued by the District Magistrate of the district concerned It is clear from this notice that the mandatory requirement was that the solvency certificate was to be in respect of cash and immovable property and it has to be certified by the District Magistrate concerned The petitioner has attached the solvency certificate which he had submitted before the Executive Engineer This has been attached as Annexure 6 to the petition We have perused this certificate This has been issued by the Tahsildar Jalaun on 24 7 1990 and counter signed by A D M (Project) Jalaun Certificate is in respect of movable and immovable properties and not in respect of cash and immovable property It has also not been signed by the District Magistrate concerned In the counter affidavit filed on behalf of the State of U P in paragraph 6 it has been catagorically stated that under clause (2) of the auction notice the solvency certificate had to be issued by the District Magistrate in original which has not been done It has been further stated that the solvency certificate includes movable property which was not required in the auction notice as also under the Government Order dated 28 6 1982 which has been attached as Annexure CA II to the counter affidavit which is the basis of clause (2) of the auction notice Annexure CA II was issued by the State Government on 28th June, 1982 It was clearly provided in the said order that solvency certificate will only be accepted in regard to cash and immovable property and that it has to be signed by the District Magistrate concerned It is, therefore clear that the solvency certificate submitted by the petitioner was not in accordance with clause (2) of the auction notice In the circumstances, it cannot be said that the Executive Engineer, Public Works Department acted illegally in not permitting the petitioner to participate in the auction We do not agree with the submission made by the learned counsel for the petitioner

8 In view of the above in our opinion there is no merit in this petition and is accordingly liable to be dismissed

9 The petition is accordingly dismissed.

Petition dismissed

1991 ALL L J 1098
= 1992 CRI L J 181

SURYA PRASAD, J

Sri Ram and another, Revisionists v State of U P and another, Opposite Parties

Criminal Revn No 390 of 1990, D/-8-5-1991

Criminal P C (2 of 1974), Ss 133, 137 — Public nuisance — Removal of construction on public path — Order of — Existence of public path denied by opposite party — Failure to record finding whether denial was correct or not — Order of removal was illegal

1979 Cri LJ NOC 175 (All), Followed
(Para 7)

Cases Referred	Chronological	Paras
1979 Cri LJ NOC 175 (Foll)	1979 All Cri R 267	6

Govind Saran, for Revisionists, Standing Counsel, for Opposite Parties

ORDER — This is a criminal revision against the judgment and order dated 20-2-90 passed by the Ist Addl Sessions Judge, Basti in Criminal Revision No 397 of 1989 Bhagirathi v Shri Ram and others setting aside the judgment and order dated 20-6-89 passed by the Sub-Divisional Magistrate, Harraiya, District Basti in Criminal Case No A-104/11/86 Shri Ram v Bhagirathi under S 133, Cr P C, P S Chhawani, District Basti

2 The facts of the case briefly stated are that the Sub-Divisional Magistrate after perusing the report of the Station Officer of the police station concerned dated 15-5-88 passed a conditional order directing the opposite party Bhagirathi and another to remove the constructions raised by them within 15 days or to appear in the Court to show cause why the conditional order should not be made final The opposite party Bhagirathi appeared in the Court and filed his objection denying the existence of any public path The Naib Tehsildar concerned submitted his spot inspection report Bhagirathi produced one witness Sukhdeo in his denial evidence

3 Having considered the evidence on record, the learned Magistrate came to the conclusion that there existed a public path in which Bhagirathi had made constructions Aggrieved of his order, Bhagirathi preferred a revision against the same The revision was allowed and the order of the Magistrate was set aside by the Additional District Judge, Basti vide his order dated 20-2-90 Aggrieved of his order Shri Ram and another preferred this revision against the same

4 I have heard the learned counsel for the parties and have gone through the impugned judgment and order referred to above

5 The revisionists made a complaint that opposite party No 2 Bhagirathi was making constructions on the public path On that complaint a report was called from the Station Officer of the police station concerned The Naib Tehsildar concerned also submitted his spot inspection report The opposite party No 2 Bhagirathi produced the evidence to deny the very existence of the public path It is on the basis of all this that the learned counsel for the revisionists has argued that the learned Magistrate has passed his impugned judgment and order after consideration of the evidence on record and therefore, there is no illegality, irregularity or impropriety in his order dated 20-6-89 On the contrary, according to him, the order dated 20-2-90 passed by the Ist Additional Sessions Judge, Basti is illegal, arbitrary and perverse

6 The learned counsel for the opposite parties has on the other hand, placed reliance upon the case of Mohammad Aziz v State, 1979 All Cri R 257 (1979 Cri LJ NOC 175) (All) wherein it has been inter alia observed "at the stage of S 137, Cr P C the only finding that the Magistrate could have given was whether the denial made by the applicant was correct or not "

7 There is no such finding recorded by the Magistrate in the instant case Therefore his order dated 20-6-89 is wholly erroneous In this view of the matter Ist Additional Sessions Judge had not committed any illegality, or impropriety in passing his judgment and order The contention of the learned counsel for the revisionists to the contrary is not acceptable to me

8 In the result the revision is dismissed The impugned judgment and order of the Ist Additional Sessions Judge Basti are confirmed The Magistrate concerned is however directed to reconsider the entire evidence on record and give a clear finding in accordance with law on the correctness or otherwise of the denial made by the opposite party No 2 Bhagirathi Let the record if any be sent back immediately to the Court concerned

Revision dismissed

1991 ALL L J 1099

M L BHAT J

Kitabu, Petitioner v District Magistrate/Election Officer, Muzaffarnagar and others, Respondents

C M W Ps Nos 20867 of 1988 and 9696 of 1989 D/ 29 10-1991

(A) U P Panchayat Raj Act (26 of 1947), S 12G — Gaon Panchayat — Elections — Petitioner elected as pradhan — Bifurcation and reconstitution of areas of gaon sabha made thereafter by Govt notification — Fresh elections of Panchayat held under S 12G — Petitioner contested fresh election but declared unsuccessful — Petitioner cannot, thereafter, challenge fresh elections

Evidence Act (1872), S 115

(Paras 23, 24)

(B) U P Panchayat Raj Act (26 of 1947), Ss 12(2), 12G — Provisions under S 12(2) and S 12G — Constitutionality — Gaon Panchayat constituted under general provision of S 12(2), continues to operate for five years — S 12(G) is deeming provision that comes into play in case of reconstitution of Gaon Sabha, when term of existing panchayat deemed to be expired and fresh elections held — Both sections operate in different situations and therefore not ultra vires constitution

Section 12(2) is a general provision and if there is no reconstitution of the Gaon Panchayat for any area the Gaon Panchayat constituted under S 12(2) is to continue for five years or for 12 years till the Government makes a notification in this behalf. But if there is reconstitution of the Gaon Panchayat in the whole State or in specific area S 12G will come into play Under S 12G after the reconstitution of Gaon Panchayat in the whole State or in any specific area the term of the existing Gaon Panchayat is deemed to have expired and fresh election is to take place The deeming provision contained in S 12G in respect of expiry of the term of Gaon Panchayat before expiry of statutory period of five years makes it possible for a constituted Gaon Panchayat to hold fresh election The deeming provision is to come into play on happening of certain contingencies which could not be foreseen when the Gaon Panchayat was constituted originally The two provisions of the same statute do not overlap each other nor would it be a case where provision is rendered redundant by another provision of the same statute The areas of the operation of the two provisions of the same statute are clearly discernible It is not possible to hold that there is any conflict between S 12(2) and S 12G of the Act The legislative omissions noticed in the two provisions of the Act are only imaginary and not real Both provisions of the law have to operate in different situations and the provisions contained in S 12G is an exception to S 12(2) of the Act and S 12 could not be held to be bad or ultra vires

(Paras 14 15, 20)

Cases Referred	**Chronological Paras**
AIR 1968 SC 1344	22

R H Zaidi, for Petitioner Standing Counsel and C S Sharma for Respondents

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LI/AJ/A1256/91/MPP

ORDER — These two writ petitions i e Writ Petitions Nos 20867 of 1988 and 9696 of 1989 filed by the petitioner are being decided by one judgment

2. In Writ Petition No 20867 of 1989, the petitioner seeks relief of certiorari for quashing the proceedings of the election held on 9 10 1988 and its result as contained in Annexure 3 to the writ petition Further a writ of mandamus is prayed to be issued commanding the respondents, their agents and employees not to interfere with the petitioner in his functioning as Pradhan of Gaon Basera district Muzaffarnagar In Writ Petition No 9696 of 1989 besides the relief of mandamus, relief of certiorari is also claimed for quashing the letter dated 2 5 89 written by Zila Panchayat Raj Adhikari to Khand Vikash Adhikari, Kairana, contained in Annexure-4 to the writ petition By this letter the charge of the Pradhan was required to be handedover to the Up Pradhan respondent No 4 to the writ petition Fate of Writ Petition No 9696 of 1989 would depend upon the success or failure of writ petition No 20867 of 1988 Therefore the two writ petitions are decided together

3 To appreciate the dispute raised in the writ petitions appropriately it is necessary to advert to the facts as set in the pleading of the parties.

Gaon Sabha Basera consists of the following villages —

1 Basera Abad 2 Basera Ghair Abad
3 Pather 4 Mukundpur

This Gaon Sabha is said to have been constituted on 6 7 88 after following the election process which was notified earlier The petitioner is said to have secured 629 votes while his rival is said to have secured only 468 votes The petitioner was declared elected as Pradhan of the Gaon Sabha by the Returning Officer There are 12 members of the Gaon Sabha including one lady member who was co opted directly by the majority of the members of the Gaon Sabha In a meeting of the executive committee of the Gaon Sabha held on 16 8 88 the petitioner was appointed Pradhan of the executive and one Sari Isam Singh was elected as Up- Pradhan of the executive The petitioner thereafter was co opted as a member block development committee who elect Block Promukh of the Development Block On 6 10 88 through a publicity by drum it was known that the election of the Gram Panchayat Basera will again be held The petitioner is said to have lodged a protest before respondent No 2 against the proposed election which according to the petitioner was being held in violation of law In spite of the protes made by the petitioner the election was held on 9 10 1988 The election could not be held because the elected body which was constituted on 6 7 88 was to hold office for five years under the provisions of the Panchayat Raj Act, hereinafter called the Act

4 It is stayed by the petitioner that respondent No 2 has no jurisdiction to hold fresh election of the office bearers and members of Gram Panchayat Basera after the petitioner was elected as Pradhan of the said Panchayat on 5 7 88, result whereof was declared on 6 7 88 After the election was over, respondent No 3 was declared as Pradhan of Gaon Sabha Basera on 9 10 88 Copy of which is filed as Annexure — 3 to the writ petition The petitioner has stated that entire proceedings of the election held on 9 10 88 are null and void because the same is contrary to the provision of the Act and the rules framed thereunder The petitioner's election held on 5 7 88 was final The respondents could not hold a fresh election before five years' term of the petitioner expired On the basis of the election dated 9 10-88, respondent No 3 is said to be threating to oust the petitioner from the office of Pradhan of the Gram Panchayat Basera The petitioner submits that he still holds the office in pursuance of a valid election On the basis of the aforesaid facts relief of certiorari and mandamus is claimed by the petitioner By an interim order dated 31 10 88 issued by this Court, respondent No 3 was directed not to

function as Pradhan of Gram Sabha Basera, district Muzaffarnagar

5 In the counter affidavit filed by respondent No 3 it is stated that in terms of Government Notification dated 23 8 88, the Gram Sabha, Basera was bifurcated Two Gaon Sabhas were brought in existence, one consisting of villages Basera Abad and Basera Ghair Abad, the other consisting of villages Pather and Mukundpur, and four more Gaon Sabhas from out of Kairana Dehat were carved out The Director of Panchayat Raj by his letter dated 13 9 88 called upon respondent No 1 to take preliminary steps immediately and hold elections in the newly constituted Gaon Sabhas and their Panchayats After the publication of the notification for constitution of six Gaon Sabhas, there had also been a publication at Tahsil Head Quarters of Tahsil Kairana and at the officer of District Panchayat Officer Muzaffarnagar notifying creation of six more Gaon Sabhas Out of this creation the two Gaon Sabhas, namely Gaon Sabha Basera Abad and Basera Ghair Abad and Gaon Sabha of Pather and Mukundpur are relevant for the purposes of this writ petition

6. On 3 10-88 the Joint Director Elections, Lucknow is said to have addressed a Radiogram to respondent No 1 to hold an election of the newly carved out Gaon Sabhas as per the election schedule already submitted. For election to the Basera Gaon Sabha, Block Development Officer, Block Kairana was appointed as Returning Officer The petitioner is also said to have participated in this election Polling had taken place in presence of the petitioner and the result of the said election was declared on 10 10 88 by the Returning Officer The petitioner is said to have secured 356 votes and respondent No 3 secured 359 votes Respondent No 3 was declared as Pradhan of the Gaon Sabha on the basis of number of votes polled by him The documents indicating steps taken during the election process are placed on the record The woman member remains to be coopted and election of Up Pradhan could not be held due to an interim stay received through the petitioner from this Court. The petitioner is said to have concealed the relevant facts and has obtained interim stay from the Court whereby the functioning of the elected Gaon Sabha has been stalled After the declaration of the election result the only remedy available to the petitioner is to file an election petition before the Prescribed Authority, the Sub-Divisional Officer under S 12C(1) of the Act and the Rules framed thereunder

7 In reply to various paras it is stated that the Gaon Sabha, for villages Pather and Mukundpur is an independent and new Gaon Sabha. In the same manner Gaon Sabha, for village Basera Abad and Basera Ghair Abad, is a separate entity The elections held on 5 7 88 for the old Gaon Sabha comprising of four villages, is not denied The petitioner is said to have participated in the election of the newly created Gaon Sabha His contention that he had signed blank paper which was later used by the authorities, is said to be concoction and afterthought It is stated that powers exercisable by the State Government under S 3 of the Act have been delegated to the Director of Panchayats under the provisions of the Act The State Government is said to be within its right to establish a new Gaon Sabha The petitioner is said to have concealed the facts which were specifically known to him

8. The petitioner has filed two rejoinder affidavits and the respondent No 3 also has filed a Supplementary — Counter affidavit which will be discussed a little later The petitioner appears to have filed an application for amendment of the writ petition in December, 1988 The application for amendment supported by the affidavit is prayed to be treated as part of the writ petition and it was actually treated as such and the petitioner was allowed to argue the case on the basis of the pleas raised in the application for amendment of the writ petition In the petitioner's opinion there is some overlapping or lacunae in the language of S 12G and S 12(2) of the Act The petitioner submits that the State Government has no power to constitute the Gram Panchayat and nor can reconstitution as contemplated by S 12G of the Act be done by the State Government The petitioner's contention is that Gaon Sabha may be reconstituted but Gram Panchayat elected once has to remain in force for five years and it will govern the reconstituted Gram Sabha for the said term The reconstitution of the gram Panchayat is said to be illegal The U P State is also prayed to be arrayed as party The provisions of sub-sec (2) of S 12 of the Act and S 12G of the Act so far as they provide reconstitution of Gaon Sabha by the State are ultra vires of the Act and the Constitution It is also stated that under the Act on exclusion of a village from a particular Gaon Sabha no fresh election in respect of non-excluded village is to take place and the existing Gaon Panchayat shall continue to function for the non excluded village for the full term The election for Gram Panchayat could be held only for newly constituted Gaon Sabha and not for the original Gaon Sabha from which the village is excluded Villages of original Gaon Sabha is termed as non excluded villages

9 In the rejoinder affidavit the petitioner has refuted the facts set up by respondent No 2 and has reiterated the assertion made by him in the writ petition Supplementary rejoinder affidavit also does not mention any other point which was not there in the pleadings

10 Learned counsel for the parties were heard in the writ petition The learned Standing Counsel also was heard Some facts which are admitted in the pleadings of the parties are as under

1 That there was an old Gaon Sabha known as Basera Gaon Sabha comprising of four villages namely, Basera Abad, Basera Ghair Abad, Pather and Mukhundpur

2 For the said Gaon Sabha the elections of the Gram Panchayat and its executive were held on 5 7 88 Result of the said election was declared on 6-7 88 in which the petitioner was elected as Pradhan of the Gaon Sabha and the said Gaon Sabha had come into being and started functioning A lady member also was co opted in the executive In all 22 members were elected for Gram Panchayat and the petitioner was elected as Pradhan

3 The Gaon Sabha was bifurcated after preparation of scheme of carving out six Gaon Sabha in Kairana Tahasil on 23 8 88 As a result of this bifurcation, apart from four other Gaon Sabhas, Basera Gaon Sabha was bifurcated into two Gaon Sabhas namely Gaon Sabha Basera Abad and Basera Ghair Abad The new Gaon was for the villages Pather and Mukundpur (The petitioner terms Pather and Mukundpur villages as excluded villages and Basera Abad and Basera Ghair as non excluded villages) A fresh election for newly constituted Gaon Sabha to elect its executive was held on 9 10 88 in pursuance of an elected schedule which was duly published and election was held on 9 10 88 The result of the said election was declared on 10 10 88

4 The petitioner had also taken part in the said election Respondent No 3 was elected and the petitioner was defeated for the post of Pradhan

11 Mr Zaidi has submitted that election held on 5 7 88 cannot be nullified before five years' term He has referred to certain provisions of the Act A perusal of these provisions reveals that under S 3 of the Act the State Government is empowered to establish a Gaon Sabha for a village or group of villages by notification in the official Gazette The State Government also is empowered to declare the name and territorial jurisdiction of the Gaon Sabha in the notification mentioned in sub section (1) of S 3 It can include either on its own motion or on the request of a Gaon Sabha or on the request of the residents of any village any area or exclude any area from the area of the Gaon Sabha and make such incidental, and consequential orders as may be necessary for effecting the changes If any area is included in the jurisdiction of the Gaon Sabha such area shall thereby become subject to all notification rules regulations bye laws and

orders made under this or any other enactment in force in the area within the jurisdiction of the aforesaid Gaon Sabha Under S 96 A the State Government can delegate all or any of its powers under this Act to any Officer or Authority subordinate to it subject to such conditions and restrictions as it may deem fit to impose

12. Under S 4 of the Act every Gaon Sabha shall be a body corporate having perpetual succession and a common seal S 4 gives autonomous status to the Gaon Sabha Under S 5A Gaon Sabha is to consist of adults ordinarily residing within the area for which it is established However, member who is not citizen of India and is of unsound mind and stands so declared by a competent Court, is disqualified to be a member of the Gaon Sabha. Under S 12 of the Act executive of the Gaon Sabha is to be constituted which shall be called Gaon Panchayat and subject to provisions of S 12G the terms of every Gaon Panchayat shall be five years or if the State Government so declares by notification in the official Gazette such longer term not exceeding 12 years as it may deem fit However, S 12G, which is exception to S 12, provides as follows —

> 12G General Election — Notwithstanding anything contained in this Act, the State Government may
>
> (a) at any time order reconstitution of Gaon Panchayat in the whole State or in any specific area thereof and thereupon the term of such Gaon Panchayats shall be deemed to have expired any fresh election, nominations and appointments may take place accordingly, and
>
> (b) when there is change in the jurisdiction of a Nyaya Panchayat, order such changes in the constitution of the Nyaya Panchayat as it considers necessary in view of the change in the jurisdiction "

13 From the reading of the aforesaid provisions of law contained in S 12G of the Act, which starts from non obstante clause, it transpires that on the order of reconstitution of Gaon Panchayat in whole of the State or in any specific area thereof, the term of such Gaon Panchayat shall be deemed to have expired and a fresh election, nomination and appointments, may take place accordingly and where there is change in the jurisdiction of the Nyaya Panchayat, the Government may order such change in the constitution of the Nyaya Panchayat as it considers necessary in view of the change in the jurisdiction

14 Mr Zaidi has seen some legislative omissions in the provision of law as contained in S 12(2) and S 12G of the Act The legislative omissions noticed by Mr Zaidi in the two provisions of the Act are only imaginary and not real Both provisions of the law have to operate in different situations and the provisions contained in S 12G is an exception to S 12(2) of the Act.

15 There is no difficulty of any kind in reconciling the provisions of law, contained in S 12(2) and S 12G of the Act S 12(2) is a general provision and if there is no reconstitution of the Gaon Panchayat for any area, the Gaon Panchayat is to continue for five years or for 12 years if the Government makes a notification in this behalf. But if there is reconstitution of the Gaon Panchayat in the whole State or in any specific area, S 12G will come into play The two provisions of the same statute do not over lap each other nor wpould it be a case where one provision is rendered redundant by another provision of the same statute The areas of the operation of the two provisions of the same statute are clearly discernible It seems that legislature has taken care of the eventuality when a Gaon Panchayat is needed to be reconstituted for a specific area by including or excluding a particular area from the Gaon Sabha However, for inclusion or exclusion of a particular area, the scheme of the Act has to be made workable If S 12G was not engrafted in the Act that would have been a legislative lapse, but by incorporating S 12G of the Act a comprehensive scheme is made for working of the Gaon Panchayat for a different area which may be constituted from time to time It is not possible to hold that there is any conflict between S 12(2) and S 12G of the Act The contention of Mr Zaidi in this regard is therefore, to be overruled

16 Under S 110 of the Act the State Government is empowered to make rules for carrying out the purposes of the Act Rule 3 provides for establishment of Sabhas A list of Sabhas constituted and established thereunder in each Tahsil shall be published at the Tahsil Headquarters and at the office of District Panchayat Officer Rule 3A, is with regard to changes in the jurisdiction of Sabhas It gives a procedure as to how such changes are to be effected Rule 3AA provides division of funds if a part of area of Gaon Sabha established under the Act is transferred to another Gaon Sabha and so on Rule 3 AAA deals with the situation where Gaon Sabha is included in a municipality, cantonment notified area or town area, the Gaon Sabha shall cease and its assets and liabilities shall be transferred to the local body in which such area is included

17 Rule 3D (1 A) provides that the existing members of Gaon Panchayat even though in excess of the number prescribed shall continue to be members of the Gaon Panchayat concerned till the expiry of the term of that Gaon Panchayat This sub rule is exception to Rule 3D(1) Rule 3D(1) prescribes the number of members allotted to each Gaon Panchayat in addition to the Pradhan Where the population of Gaon Sabha does not exceed five hundreds the number of members allotted to the Gaon Sabha are seven Where population of the Gaon Sabha exceeds 500 hundreds but does not exceed 1000, the number of members allotted to such Gaon Sabha is nine and so on and so forth Rule 3D(1A) shows that for any reason if existing members of the Gaon Panchayat are in excess of the number prescribed they shall continue to be members of the Gaon Panchayat concerned till the expiry of the term of the Panchayat It makes Rule 3D directory and not mandatory The number in addition to the members which are to be allotted to each Gaon Sabhas on the basis of its population is [illegible] and if there is any excess that excess will be allowed to continue till the full terms is expired This is in short the import of the said Rule It does not postulate that members of a Gaon Panchayat shall continue even after bifurcation of Gaon Sabha or reconstitution of the areas of the Gaon Sabba

18 The learned counsel for the respondents submits that clause (2C) of Rule 3B authorises the District Magistrate, subject to the directions issued from the Direcor of Panchayats to re-determine the circles of Nyaya Panchayats and amend the list prepared under Rule 3B which is to be published If any area is included in or excluded from the circle of a Nyaya Panchayat the District Magistrate can pass suitable orders subject to the directions of of the Director of Panchayats regarding the total number of panches and formation of benches of Nyaya Panchayat

19 Learned counsel for the respondents also refers to S 11 B(2) of the Act which says that the term of the Pradhan shall commence from the date of the constitution of the Gaon Panchayat or fromthe date of his being elected or nominated, whichever is later, and unless otherwise under the provisions of this Act, shall expire with the term of the Gaon Panchayat This section also makes it possible to hold that the term of the Pradhan shall commence and expire in normal course, unless otherwise provided under the provisions of the Act This provision also takes note of S 12G

20 Under S 12G, after the reconstitution of Gaon Panchayat in the whole State or in any specific area, the term of the Gaon Panchayat is deemed to have expired and fresh election is to take place The deeming provision contained in S 12G in respect of expiry of the term of Gaon Panchayat before expiry of statutory period of five years makes it possible for a constituted Gaon Panchayat to hold fresh election The deeming provision is to come into play on happening of certain contingency which could not be foreseen when the Gaon Panchayat was constituted originally If no contingency takes place the Gaon Panchayat may last for five years but if there is reconstitution of Panchayat by adjustment or areas, the areas excluded from the original Panchayat which are to form areas of new Panchayat, can have new election and the original Gaon Panchayat for the whole area would cease to be operative for such areas which are excluded from the area of the original Gaon Panchayat Therefore, S 12 cannot be held to be bad or ultra vires of the constitution as contended by Mr Zaidi

21 Rule 3D(IA) also will not help Mr Zaidi because that Rule as already stated has different connotation and its import has to be judged in the context of Rule 3D(1)

22 Learned counsel for the respondents also relied on an authority in Ayodhya Prasad Vajpai v State of U P reported in AIR 1968 SC 1344 The Supreme Court was considering certain provisions of the Act and it has observed that —

> Provisions of Ss 3 and 8 do not involve excessive delegation of legislative functions to State Government They are supported by adequate safeuards or guide The underlying policy and the objective of the legislation is clearly set out and the details of the duties of the Kshettra Samitis are indicated It has however, been left to the State Government to determine what the Khands should be and how many Kshetra Samitis should be constituted in each district This is not a subjects for detailed legislation because it is eminently a matter which can be left to the determination of the Executive which is to act in conformity with the wishes of the local people,the political exigency of the situation and the requirements of administrative control The Act has not erred by conceding unfettered or uncanalised power to the State Government On the other hand it has itself spoken on the relevant subject in full detail so as to outline its own will which alone the Executive is supposed to implement

23 The petitioner is said to have taken part in the election held on 10 10 88 for the post of Pradhan of Gaon Sabha He had secured 356 votes and his rival had secured 359 votes This fact has conveniently been omitted by the petitioner in his writ petition

24 After having taken part in the election and after having contested the election the petitioner cannot be heard to say that no election could be held for the newly created Gaon Sabha He has tried to take benefit from the election notification which is now challenged by him after he was declared unsuccessful in the said election The petitioner cannot blow hot and cold

25 As a result of the aforesaid discussion writ petition No 20867 of 1988 fails and is hereby dismissed The interim order granted by this Court is also vacated Writ Petition No 9696 of 1989 shall also fail because the petitioner has failed in the main writ petition This writ petition was only consequential writ petition and it could be allowed only if the petitioner would succeed in writ petition No 20867 of 1988 Since the petitioner has failed in the said writ petition therefore the follow up action pursued by the petitioner will also lapse The result is that letter dated 2 5 89 contained in Annexure-4 in the said writ petition cannot be said to be bad

26 However in view of the judgment in Writ Petition No 20867 of 1988 the election held on 9 10 88 result whereof was declared on 10 10 89 in which respondent No 3 was elected as Pradhan is valid and does not suffer from any vice

27 In view of the peculiar circumstances of the case there will be no order as to costs

Writ petitions dismissed

1991 ALL L J 1105

R R K TRIVEDI J

Smt Juggan Petitioner v Board of Revenue U P Respondents

Civil Misc Writ Petn No 19390 of 1991, D/ 10 7 1991

Transfer of Property Act (1882) S 43 — Benefit of S 43 — Vendee knowing that vendor was only co tenant — Vendor becoming exclusive owner — Vendee cannot claim benefit of provision

AIR 1956 All 225 (FB) Held no longer good law in view of AIR 1962 SC 847

For claiming benefit of S 43 of the Act a transferee should not only prove that there was a fraudulent and erroneous misrepresentation about title by the transferor but he should also prove that even after taking all due care as can be expected from a reasonable person, he could not find out the correct position regarding title and he was ignorant about the truth Where the vendor was recorded in the revenue records only as a co tenant and the vendee was fully aware that she was not exclusive bhumidar of the land in dispute, the provisions of S 43 could not be attracted

AIR 1956 All 225 (FB) Held no longer good law in view of AIR 1962 SC 847

AIR 1962 SC 847 Follo

(Para 8)

If the purchaser having full knowledge of the defective title of the vendor agrees to purchase, it cannot be said that he acted bona fide on fraudulent or erroneous representation and is entitled for equitable consideration raising estoppel against the transferor who acquired interest subsequently For application of S 43 it is not only necessary that there should be fraudulent and erroneous misrepresentation by transferor regarding his right to transfer but on the basis of misrepresentation action of purchase by transferee should also be based on the alleged representation If the transferee has knowledge of the truth, it cannot be said that his action of purchase was based on the fraudulent and erroneous representation made by the transferor regarding his title

(Para 7)

Cases Referred	**Chronological Paras**
AIR 1962 SC 847 (Foll)	7
AIR 1956 All 225 (FB) (Held no Longer good law in view of AIR 1962 SC 847	7

S D Pathak, for Petitioner, Standing Counsel, for Respondents

ORDER — This petition has been filed challenging the judgment dated 12 3 1991 passed by Board of Revenue, U P , Allahabad and order dated 5 4 1984 passed by Additional Commissioner Faizabad Division Faizabad

2 The facts in brief giving rise to this petition are that plots Nos 326/1 356 353 354 and 329 were recorded in names of Smt Dulari and her mother in law Mst Balwanta in revenue papers Smt Ram Dulari by registered sale deed dated 7 6 1965 transferred aforesaid plots in favour of petitioner The sale deed has been filed as Annexure IV to the writ petition In this sale deed Smt Ram Dulari has described herself as Bhumidhar in the following manner –

" मनमुकिर आराजियात मुन्दर्जा तेहत दस्तावेज हाजा मौकूआ मौजा दरियापुर परगना मीरानपुर तहसील व जिला सुल्तानपुर की भूमिधर बा सिलसिला शौहर खुद रही है और बिला शिरकत गैरे व मदाखलत दीगरे का बिज व दाखील चली आ रही है और उसको अख्तियार इन्तिकाल हासिल है ।"

She transferred the aforesaid plots for a consideration of Rs 6,000/ Name of Smt Ram Dulari continued in revenue papers Mst Balwanta died some time in 1973 74 and after death her share devolved on Smt Ram Dulari Smt Ram Dulari by registered sale deed dated 4 6 1979 transferred the share of Mst Balwantu for consideration of Rs 13 000/ in favour of respondents 3 and 4

3 Plaintiff petitioner filed suit No 127/141/78 under S 229 B of the U P Z A and L R Act for declaration that they are exclusive tenure holders in possession of the aforesaid plots on the basis of the sale deed dated 7 6 1965 They claimed benefit of S 43 of the Transfer of Property Act on the ground that Smt Ram Dulari in the sale deed represented herself to be the exclusive Bhumidhar of the land in dispute and as she after death of Mst Balwant inherited her share also, she was bound by her representation made in the sale deed and petitioner is exclusive Bhumidhar

4 The trial court decreed the suit on 23 6 1981 and held that petitioner is entitled for benefit of S 43

5 Respondents filed appeal No 164 of 1981 from the aforesaid decree This appeal was allowed by Additional Commissioner by judgment dated 5 4 1984, annexure II to the writ petition and the decree passed by the trial court was set aside and suit of petitioner was dismissed The judgment of the Additional

Commissioner was questioned in Second Appeal No 77 of 1983 84 before the Board of Revenue which has been upheld by judgment dated 12 3 1991 Challenging both these judgments the present writ petition has been filed

6 Additional Commissioner, Faizabad found petitioner not entitled for the benefit of S 43 on two grounds, firstly that Smt Ram Dulari did not describe herself in the sale deed as exclusive Bhumidhar of the land in dispute and stated herself only Bhumidhar in relation with her husband, and secondly. that in revenue papers both Mst Balwanta and Smt Ram Dulari were recorded and both the parties were aware that Smt. Ram Dulari was entitled to transfer only a share as co bumidhar and there was no question of any fraudulent or erroneous representation by the transferor The Board of Revenue took the same view and held that the record of rights of the relevant year clearly mentioned that Mst Balwanta and Smt Ram Dulari both were recorded as co tenants and it cannot be believed that petitioner purchaser had not looked into the revenue records before making the bargain and, therefore, it cannot be believed that she did not know at the time of sale deed that the transferor was not entitled in law to transfer the entire land There was no question of any misrepresentation or fraud in the facts and circumstances of this case

7 Shri S D Pathak, learned counsel for petitioner, after referring to the provisions of S 43 of the Transfer of Property Act relied on a Full Bench decision in case Parmanand v Champa Lal reported in AIR 1956 All 225 This Full Bench took the view that one of the doctrines of equity is that equity treats that as done which ought to be done Thus equity creates personal obligation which compels the transferor to perform his contract when he is able to do so on the acquisition of subsequent interest In the application of this doctrine of equity it is immaterial that the promisee or transferee knew the truth, namely that the promisor or the transferor had no authority to transfer the interest which he purported to transfer Taking this view, the Full Bench answered the question referred to it as under (at p 230 of AIR) —

> I am clearly of opinion that the correct view is that S 43 T P Act. does not require that the transferee who can take advantage of it should be one to whom not only a fraudulent or erroneous representation about the transferor s authority to transfer the property is made but should also be one who did not have knowledge of the true factual position and had merely acted on the belief of the erroneous or fraudulent representation made to him by the transferor
>
> If, however both the transferor and the transferee knew of the true position, and colluded to enter into a transaction which is invalid in law, the State of knowledge of the transferee becomes material and S 43 cannot be availed of by him

I have thoroughly considered the submissions made by Shri Pathak and have also considered the view taken by the aforesaid Full Bench In fact if the transferee is found to have the knowledge of the true facts it cannot be believed that he acted and purchased the land in dispute for consideration on the basis of the fraudulent or erroneous representation The two cannot exist together If the purchaser having full knowledge of the defective title of the vendor agrees to purchase it cannot be said that he acted bona fide on fraudulent or erroneous representation and is entitled for equitable consideration raising estoppel against the transferor who acquired interest subsequently For application of S 43 it is not only necessary that there should be fraudulent and erroneous misrepresentation by transferor regarding his right to transfer but on the basis of misrepresentation action of purchase by transferee should also be based on the alleged representation If the transferee has knowledge of the truth, it cannot be said that his action of purchase was based on the fraudulent and erroneous representation made by the transferor regarding his title Provisions of S 43 were considered by Hon ble Supreme Court in case Jumma Masjid, Mercara v Kodmaniandra Deviah reported in AIR 1962 SC 847 The view taken by Hon'ble Supreme Court regarding provisions of S 43 mentioned in para 15 of the judgment supra is being extracted below —

"(15) This reasoning is open to the criticism that it ignores the principle underlying S 43 That Section embodies as already stated, a rule of estoppel and enacts that a person who makes a representation shall not be heard to allege the contrary as against a person who acts on that representation It is immaterial whether the transferor acts bona fide or fraudulently in making the representation It is only material to find out whether in fact the transferee has been misled It is to be noted that when the decision under consideration was given the relevant words of Section 43 were 'where a person erroneously represents' and now as amended by Act 20 of 1929 they are 'where a person fraudulently or erroneously represents', and that emphasises that for the purpose of the Section it matters not whether the transferor acted fraudulently or innocently in making the representation and that what is material is that he did make a representation and the transferee has acted on it

Where the transferee knew as a fact that the transferor did not possess the title which he represents he has then he cannot be said to have acted on it when taking a transfer Section 43 would then have no application and the transfer will fall under S 6(a) But where the transferee does act on the representation there is no reason why he should not have the benefit of the equitable doctrine embodied in S 43, however fraudulent the act of the transferor might have been"

8 In view of the aforesaid judgment of Hon'ble Supreme Court, in my opinion the view expressed by Full Bench of this Court is no more a good law and stands overruled In my opinion, for claiming benefit of S 43 of the Transfer of Property Act, a transferee should not only prove that there was a fraudulent and erroneous misrepresentation about title by the transferor but he should also prove that even after taking all due care as can be expected from a reasonable person, he could not find out the correct position [illegible] the title [illegible] was ignorant about the title In the present [illegible] as the two courts below have recorded a finding that Smt Ram Dulari was recorded only as a co tenant and the purchaser petitioner was fully aware that she is not exclusive bhumidhar of the land in dispute, the provisions of S 43 could not be attracted The suit of the petitioner has rightly been dismissed The orders impugned in this petition passed by respondents Nos 1 and 2 do not suffer from any error of law

9 The writ petition has no force and is accordingly dismissed in limine

Petition dismissed

1991 ALL L J 1108

N L GANGULY, J

Committee of Management Sarvodaya Inter College, Bankata Deoria, Petitioner v District Inspector of Schools Deoria and others Respondents

Civil Misc Writ Petn No 9871 of 1991 with W P No 26028 of 1990 D/ 8 5 1991

U P **Intermediate Education Act (1921), S 16A(7) — Powers of Deputy Director of Education — Scope — Actual and effective control over affairs of management of Institution — Dispute as to, between rival committees of management — Must be adjudicated by Deputy Director — Determination of validity of elections of committee of management — Is not within jurisdiction of Deputy Director**

1985 All LJ 555 and 1985 All LJ 1005, Followed

(Para 8)

Cases Referred	**Chronological Paras**
1988 All LJ 1023 1988 UPLBEC 402	8
1985 All LJ 555 (Foll)	6
1985 All LJ 1005 : 1985 UPLBEC 241 (Foll)	7

S P Singh, for Petitioner, S N Shukla, for Respondent

ORDER — There are two writ petitions pending before this Court in respect of the same Institution and the same parties The earlier one writ petition is W P No 26028 of

1990 Committee of Management v Dy Director of Education VIIth Region Gorakhpur filed through Janak Nandan Lal as Manager of the Committee of Management The relief claimed in this petition is that the judgment and order of the Dy Director of Education VIIth Region Gorakhpur dated 26th July 1990 be quashed The other reliefs were also added by the petitioner for restraining the respondents not to interfere with the functioning of the petitioners in the affairs of the Management of his Committee The other writ petition is W P No 9871 of 1991 Committee of Management, Sarvodye Inter College Deoria through Bisheshwar Singh claiming himself to be as Manager of the Committee of Management of the Institution This petition was filed on 9 4 91 The prayer in this writ petition is that the order passed by the District Inspector of Schools dated 30 3 91 (Annexure 14 to the said petition) be quashed Annexure 14 to the writ petition is the order of the District Inspector of Schools by which the operation of the order dated 26 7 90 which was stayed by the orders of the High Court dated 10 10 90 in W P No 20929/90 In connection with the said stay order after obtaining the legal advice from the Chief Standing Counsel of the High Court the D I O S directed that the signatures of Janak Nandan Lal which was attested by the D I O S may be permitted to function and operate the accounts of the Institution till further orders of the High Court This order of the D I O S was challenged by the petitioner of the W P No 9871 of 1991 This court was pleased to grant time to the learned counsel for the respondents for filing counter affidavit and directed that the petition be listed for final disposal on 15 4 91 No interim order was passed in this writ petition Since both the writ petitions are of the same Institution and the controversy is for the dispute of Managing Committee and operation of the accounts of the Institutions I propose to decide both the petitions by the common judgment Both the parties have filed counter and rejoinder affidavits The petitions are ready for hearing and with the consent of the parties, the petitions have been decided finally today

2 Heard the learned counsel for the parties

3 For appreciating the facts and circumstances of the present controversy little facts would be necessary for correct appreciation of the controversy in the petitions Admittedly the previous election for the Committee of Management was held in the year 1986 and the next election was due on 10 9 1988 The election of the Committee of Management was held on 24-9-89 which was conducted at the instance of Bisheshwar Singh the respondent No 3 of the W P No 26028/90 referred hereinafter as the Ist writ petitioner It was stated that the signatures of Janak Nandan Lal was attested by the D I O S on 17 10-89 and papers were sent to the D I O S for attestation and approval on 26 9 89 Another writ petition had been filed being W P No 20850/89 by Bisheshwar Singh before this Court by which the attestation of the signature dated 26 9 89 was challenged by him At the time of filing of the said writ petition interim order dated 10 11 89 was passed by which the High Court was pleased to stay the operation of the order dated 26 9 89 attesting the signature of Janak Nandan Lal Since the operation of the order dated 26 9 89 was stayed by the Hon ble High Court the D I O S started operating the account himself The petitioner of first writ petition challenged the action of the D I O S operating the account and usurping the function of the Committee of Management by W P No 7140 of 1990 The High Court was pleased to stay the operation of the order dated 4 12 89 so far usurping the powers of the Committee of Management by the D I O S by which he has started operating the account of the Institution as stated usurping the powers of the Committee of Management The writ petition No 20854 of 1989 and 7140/90 Both were decided by this Hon ble Court vide judgment dated 14 5 90 Annexure 4 to the first writ petition By the order of the Division Bench dated 14 5-90 this court was pleased to direct the Dy Director of Education to decide the dispute if raised before him within 15 days from he date of the judgment i e 14 5 90 within a period of two months from the date of presentation of the certified copy of the order before him

4 After the judgment of the High Court both the parties raised the dispute within the time directed by the High Court which was referred to the Dy Director of Education and the Dy Director of Education vide judgment and order dated 26 7 90 decided the reference made to him in pursuance of the judgment of the High Court The judgment and order dated 26 7 90 of the Dy Director of Education is impugned by the present writ petition The Dy Director of Education by the judgment impugned decided the case and directed that the D I O S Deoria shall get the elections of the Committee of Management conducted within a period of two months in accordance with the approved Scheme of Administration He shall examine the list of members of the General Body and proceed to hold the election within the said period During the period, he shall function and manage the general affairs of the Institution and disbursement of payment etc to the teachers and employees of the Institution The learned counsel for the parties placed the entire judgment of the Dy Director of Education A perusal of the judgment shows that he adverted himself to decide the validity of the election held in respect to the Institution in question The ultimate finding that he recorded was that the election held on 24 9 89 were not in accordance with the rules regulations provided in the elections, but (sic) he observed since the rules and regulations for holding the elections were not valid the result of the Election cannot be accepted Thus, he finally arrived at a conclusion that fresh elections be held within two months from the date of his order and the direction to the said effect was given to the D I O S to get the election conducted

5 The provisions of S 16A(7) of the U P Intermediate Education Act 1921 are quoted as under

"16-A(7) Whenever there is dispute with respect to the Management of an institution persons found by the Regional Deputy Director of Education, upon such enquiry as is deemed fit to be in actual control of its affairs may, for purposes of this Act be recognized to constitute the Committee of Management of such institution until a Court of competent jurisdiction directs otherwise

Provided that the Regional Deputy Director of Education shall before making an order under this sub section afford reasonable opportunity to the rival claimants to make representations in writing "

6 The learned counsel for the petitioner submitted that the judgment and order of the Dy Director of Education are patently illegal and are not inconformity with the provision of S 16A(7) He urged that in the entire order the Dy Director of Education has not considered this aspect that which of the rival Committee of Management is in actual effective control over the affairs of the Management of the Institution The parties of the reference are to adjudicate the question which of the contesting rival Committee of Management is in actual and effective control of the Management of the Institution If the main question which is to be decided is not decided by the Dy Director of Education, the order cannot be sustained We cited a Division Bench case of this Hon'ble Court reported in 1984 U P Local Bodies & Educational cases page 910 (sic) (1985 All LJ 555) Sudhir Kumar Pathka Manager, Committee of Management, Sri Pyare Lal Genda Lal Intermediate College, Eke, Distt Mainpuri v Regional Deputy Director of Education Agra which is quoted as under (at pp 556 57 of All LJ)

The above provision of law requires the Regional Deputy Director of Education to hold enquiry and to determine as to which of the rival committee should be recognised for the purpose of running the management of the institution That decision is not final, it is subject to the decision of a court of competent jurisdiction The Regional Deputy Director is required to hold enquiry and to decide who is fit to be in actual control of the affairs of the institution and in doing that he is required to follow the guidelines contained in the Explanation The explanation provides that in determining that question the Regional Deputy Director shall have regard as to who had control over the funds of the institution and affairs of the institution and receipt of the income of the property and also the scheme of administration approved under S 16A Sub-sec (7) of S 16A does not confer power on the Regional Deputy Director to act like an Election Tribunal to investigate and decide the validity of the election of a office bearer, instead it merely confers power on him to ensure smooth running of the institution The legislative intent is clear that a person who is in actual control of the affairs of the institution including the control over the funds of the institution properties of the institution and the scheme of administration should be allowed to continue as such till a court of competent jurisdiction directs otherwise There may be cases where the election of office bearers is seriously disputed, as is the case in the instant petition, but the Regional Deputy Director has no jurisdiction to enter into the validity of the elections It is in the light of these observations that the validity of the impugned order is to be considered '

7 He also cited another case law reported in same 1985 UPLBEC 241 (1985 All LJ 1005) Committee of Management Subhash Uchchattar Madyamik Vidayalaya Rajapur, Meerut v Dy Director of Education, Meerut Region, Meerut The submission of the learned counsel for the petitioner of the first writ petition is that when the Dy Director of Education exercises powers under S 16A(7), he is a required to decide the main question as to which of the rival Committee of Management is in actual and effective control of the affairs of the Institution However it is not barred if incidental question about the correctness or otherwise of the election said to have been held may be gone into by the Dy Director of Education In the present case, the Dy Director of Education has not incidentaly gone into the question about the validity of the committee of the management but his main thrust was to decide the validity of the election of the Committee of Management which in my opinion is not in the domaine of the Educational Authorities, which is for the civil court to adjudicate

8 The learned counsel for the respondents cited 1988 UPLBEC 402 (1988 All LJ 1023) Committee of Management, Bhakt Vatsal Intermediate College, Bichhwa, Mainpuri v Regional Dy Director of Education, Agra This decision has been cited by the learned counsel for the respondents to show that the validity of the constitution of the Committee of Management its actual effective control in the affairs of the Management of the Committee of inextricably mixed question with the validity of the election The Dy Director of Education has jurisdiction to examine the validity of the election also There is no controversy about this submission The validity of the election may be gone into but the main thrust and parties of the reference is to adjudicate the effective control over the affairs of the Management of the Institution, is to be adjudicated (sic) As already observed, the judgment of the Dy Director of Education has not adverted to the main question as required under S 16A(7) of the Act and he had proceeded to decide the question of validity of the election itself which was not in his domain

9 After hearing the learned counsel for the parties and in view of the facts and law stated above, the judgment and order of the Regional Dy Director of Education Gorakhpur dated 26 7 90 cannot be allowed to stand It is hereby quashed

10 Since there is an order of the Court Annexure 4 to the writ petition by which the High Court had specifically directed that the matter be decided under S 16A(7) by the Dy Director of Education I direct that the Dy Director of Education shall decide the reference pending before him at the instance of both the parties in accordance with law and as per directions and observations made in this judgment within a period of two months from the date of filing a certified copy of this judgment

11 Writ petition No 9871 of 1991 filed by the other Committeed of Management through Bisheshwar Singh by which the order dated 30-3-91 passed by the District Inspector of Schools was sought to be quashed Although counter and rejoinder affidavits have been exchanged between the parties in this petition also I do not propose to keep this petition pending as the first writ petition, referred above to has already been allowed and the matter has been remanded before the Dy Director of Education for deciding the reference under S 16A(7) afresh, I consider that the interim order dated 10-10 90 passed by the High Court in W P No 26028 of 1990 shall continue to remain in force till the Dy Director of Education decides the representation as directed above The

Dy Director of Education shall pass necessary and appropriate orders in favour of either of the parties in whose favour, he decides the representation that the operation of the account may be handed over to such successful party as he finds in his judgment that he would decide in the reference

12 With these observations W P No 9871 of 1991 is disposed of W P No 26028/90 Committee of Management through Janak Nandan Lal as its Manager v Dy Director of Education is allowed The order dated 26-7 90 passed by the Dy Director of Education, VII Region Gorakhpur is quashed and the Dy Director of Education shall decide the reference under S 16A(7) of the Act as directed above

13 The W P No 9871 of 1991 Committee of Management Sarvodaya Inter College, Deoria through Basheshwar Singh v District Inspector of Schools Deoria is disposed of with the above observations

14 Parties to bear their own costs

Order accordingly

1991 ALL L J 1112

V N KHARE AND M P KENIA JJ

Surendra Prakash Goel Petitioner v State of U P & Ors Respondents

Civil Misc Writ Petition No 15557 of 1991 D/ 21 5 91

(A) U P Municipalities Act (2 of 1916), S 48 — President — Removal — Proceeding for — Not quasi criminal — Proof beyond reasonable doubt — Not required

(Para 12)

(B) U P Municipalities Act (2 of 1916), S 48 — President — Removal — Misconduct — Need not necessarily relate to discharge of duties as president

It is not necessary that the misconduct alleged against the President must relate to the discharge of the duties as president This is clear from the marked contrast in the wordings of sub clauses (vi) and (viii) of clause (b) of sub-section (2) of S 48 Whereas sub-clause (vi) talks of misconduct on the part of President in the discharge of his duties sub clause (viii) includes 'any other misconduct whether as President or as Member

(Para 13)

(C) U P Municipalities Act (2 of 1916), S 48 — Removal of President — Charge — Purchase of goods worth lacs without calling for estimates, placing it on agenda and by accepting tender of unauthorised person — Charge falls within ambit of S 48 — Show cause notice issued to President under S 48(2) is proper — Notice issued by Govt after making appropriate enquiry and after consideration of relevant facts — Suspension order passed 1½ months after notice — None of the actions of Government can be said to be mala fide

(Paras 19, 22, 24)

Cases Referred	Chronological Paras
1956 All LJ 409	14

R B D Mishra Adv for Petitioner S C for Respondents

M P KENIA, J — We have on the 21st of May 1991 passed the following order —

For reasons separately recorded the petition is dismissed

2 The reasons aforesaid are indicated herein below —

3 The petitioner was elected as the President of the City Board Ghaziabad, in November 1989 and has therefore at all relevant times functioned as such The petitioner was served with a show cause notice dated 20th of March 1991 by the State Government inter alia calling upon him to show cause within a period of 15 days why he should not be removed from the post of the President The said show cause notice contained a list along with appropriate particulars of the charges against the petitioner This show cause notice a copy where of is annexed as annexure 3 to the petition, was received by the petitioner on the 1st of April 1991, and by a reply which is dated the 5th of April 1991, (Annexure 4 to the petition), the petitioner, inter alia, sought copies of various documents such as resolutions passed by the City Board Ghaziabad [illegible]

of the City Board, the particular issue of a local daily and the like and stated that after the said was made available to the petitioner, it will be necessary to collate the same with the record and therefore sought permission to do so by making the record available so as to enable the petitioner to throw light on the correct facts The petitioner by his aforesaid reply also requested that after the various materials sought by the petitioner were made available to him he should be granted one month's time to send a further reply to the show cause notice The petitioner was thereafter served with an order dated 4th of May 1991 whereby the State Government suspended the petitioner as the President of the City Board, Ghaziabad, with immediate effect pending the enquiry pursuant to the show notice dated 20th of March 1991, served upon the petitioner

4 The show cause notice has been served upon the petitioner under S 48 of the U P Municipalities Act and the order of suspension was passed by the State Government under sub-sec (3) of S 48 of the Act The petitioner thereafter, filed the present petition, inter alia seeking an issue of a writ of certiorari quashing the show cause notice dated 20th of March 1991 and all proceedings in pursuance thereof pending before the State Government and for a further writ in the nature of certiorari quashing the order suspending the petitioner as the President of the City Board, Ghaziabad passed by the State Government on the 4th of May 1991 and for costs and other reliefs

5 Section 48 of the U P Municipalities Act 1916, reads as follows —

48 Removal of President — (* *)

(2) Where the State Government has at any time reason to believe that —

(a) there has been a failure on the part of the President in performing his duties, or

(b) the President has —

(i) incurred any of the disqualification mentioned in Sections 12D and 43AA or

(ii) within the meaning of S 82 knowingly acquired or continued to have directly or indirectly or by a partner, any share or interest whether pecuniary or of any other nature in any contract or employment with by or on behalf of the Board, or

(iii) knowingly acted as President or as a member in a matter other than a matter referred to in clauses (a) to (g) of sub-sec (2) of S 82 in which he has, directly or indirectly, or by a partner any share or interest, whether pecuniary or of any other nature or in which he was professionally interested on behalf of a client, principal or other person or

(iv) being a legal practitioner acted or appeared in any suit or other proceeding on behalf of any person against the Board or against the State Government in respect of nazul land entrusted to the management of the Board, or acted or appeared for or on behalf of any person against when a criminal proceeding has been instituted by or on behalf of the Board or

(v) abandened his ordinary place of residence in the municipal area concerned or

(vi) been guilty of misconduct in the discharged of his duties or

(vii) during the current or the last preceding term of the Board acting as President or Vice-President or as Chairman of a Committee, or as a member, or in any other capacity whatsoever whether before or after the commencement of the Uttar Pradesh Local Self Government Laws (Amendment) Act 1976 so flagrantly abused his position, or so wilfully contravened any of the provisions of this Act or any rule, regulation or bye law or caused such loss or damage to the fund or property of the Board as to render him unfit to continue to be President

(viii) been guilty of any other misconduct whether committed before or after the commencement of the Uttar Pradesh Urban Local Self Government Laws (Amendment) Act, 1976 whether as President or as Vice President, exercising the powers of President or as Vice-President, or as member,

it may call upon him to show cause within the time to be specified in the notice why he should not be removed from office

(2 A) After considering any explanation that may be offered by the President and making such enquiry as it may consider necessary the State Government may, for reasons to be recorded in writing remove the President from his office.

Provided that in a case where the State Government has issued notice in respect of any ground mentioned in clause (a) or sub clauses (ii), (iii), (iv), (vi), (vii) or (viii) of clause (b) of sub-section (2) it may instead of removing him give him a warning

(2 B) An order passed by the State Government under sub section (2 A) shall be final and shall not be questioned in any court

(3) The State Government may place under suspension a President who is called upon to show cause in respect of any ground mentioned in clause (a) or sub clause (vi), (vii) or (viii) of clause (b) of sub section (2) or against whom a prosecution for an offence which in the opinion of the State Government involves moral turpitude, is commenced until conclusion of the enquiry or prosecution, as the case may be, and where a President has been so suspended he shall not for so long as the order of suspension continues be entitled —

(a) to exercise the powers or perform the duties of a President conferred or imposed upon him by or under this Act or any other enactment for the time being in force or

(b) to take part in any proceeding of the Board

(4) A President removed under sub section (2A) shall also cease to be a member of the board and in case of removal on any of the grounds mentioned in clause (a) or sub clauses (vi), (vii) or (viii) of clause (b) of sub section (2), shall not be eligible for re-election as President or member for a period of five years from the date of his removal

6 The petitioner's case was presented before us by Mr R K Jain and the respondents' case was argued by the Chief Standing Counsel Mr A P Singh, who appeared on notice

7 Sri Jain, learned counsel on behalf of the petitioner who argued the petitioner's case at great length, took us through the individual charges enlisted in the show cause notice (Annexure '3' to the petition), and submitted that —

(1) the proceedings commenced by the show cause notice are quasi criminal proceedings and the standard of proof required to bring the same home against the petitioner was proof beyond reasonable doubt

(2) as 'misconduct had not been defined anywhere in the U P Municipalities Act the misconduct alleged and proved against the petitioner must be misconduct per se and the respondents must demonstrate to the Court that each individual charge related to a particular duty that the petitioner was liable to discharge and the misconduct alleged against the petitioner must be shown in the discharge of his duties as President,

(3) even if the charges levelled against the petitioner are taken as they are, no case for taking action against the petitioner under S 48(2A) of the Act is made out so far as the charges relate to the duty of the Board and not to that of the President,

(4) That none of the charges fell within the four corners of S 48 and, as such there could never be any question for any action of removal being against the petitioner

8 The scheme of S 48 is that where the State Government has reason to believe that there has been a failure on the part of the President in performing his duty or that any of the eight grounds mentioned in sub-section (2)(b) exists, it may call upon the President to show cause within the time specified in the notice why he should not be removed from office Under sub-section (2A) after considering any explanation that may be offered by the President and making such enquiry as it may consider necessary, the State Government may either remove him from office, or, in case the notice issued against him is in respect of any ground mentioned in clause (a) of sub section (2) of sub-clauses (ii), (iii), (iv), (vi) (vii) and (viii) of clause (b) sub-section (2), it may instead of removing him, give him a warning Sub section (2B) provides that an order passed by the State Government under sub-section (2A) shall be final and shall not be questioned in any Court

9 Sub-section (3) provides inter alia, that where a show cause notice is issued against the President in respect of any ground mentioned in clause (a) of sub-clauses (vi), (vii) and (viii) of clause (b) of sub section (2) place such President under suspension and where the President has been so

suspended, for so long as the order of suspension continues he shall not be entitled to exercise powers or perform the duties of the President or to take part in any proceedings of the Board

10 Finally, sub section (4) provides that a President removed under sub-section (2A) shall cease to be a member of the Board and in case of his being removed on any of the grounds mentioned in clause (a) or sub-clauses (vi) (vii) and (viii) of clause (b) or sub-section (2) shall not be eligible for re-election as President or member for a period of five years from the date of his removal

11 It may be noticed that whereas under sub-clause (vi) of clause (b) of sub-section (2), the President is liable for removal in case of his having been guilty of misconduct in the discharge of his duties, sub-clause (viii) thereof refers to "any other misconduct whether committed before or after the commencement of the Uttar Pradesh Urban Local Self Government Laws (Amendment) Act 1976, whether as President or as Vice-President exercising the powers of the President or Vice-President or as member"

12 Referring to the four fold submissions made by Sri Jain, on behalf of the petitioner referred to hereinabove, we find ourselves unable to accept the proposition that the proceedings commenced against the petitioner pursuant to the show cause notice dated 20th of March, 1991, can correctly be termed as quasi criminal proceeding or that the standard of proof required is proof beyond reasonable doubt The proceedings only involve civil consequences The suspension in question is something temporary and does not involve any punishment properly so called All that happens is that during the period of suspension, it is not open to the President in question to exercise the powers or perform the duties as President or take part in any of the proceedings of the Board More often than not, suspension facilities the enquiry in so far as it minimises (if not eliminates) the scope for interference by the party concerned by use of his official position. The above position is well settled However, we need not refer to the case law on the point as in the light of our findings in the last two parts of Mr R K Jain's submission, the first one referred to above does not survive for consideration

13 This brings us to the second submission made on behalf of the petitioner, viz that the misconduct alleged and proved against the petitioner must be misconduct per se and that each individual charge against the petitioner should relate to a particular duty that the petitioner was liable to discharge and the misconduct alleged against the petitioner must be shown to be misconduct in the discharge of his duties as President With regard to the argument that the misconduct must relate to the discharge of the duties of the petitioner as President this argument proceeds on a very narrow view of the provisions either in ignorance or in disregard of the marked contrast in the wordings of sub clauses (vi) and (viii) of clause (b) of sub-section (2) of S 48 Thus, whereas sub-clause (vi) talks of misconduct (on the part of President) in the discharge of his duties, sub-clause (viii) includes any other misconduct whether as President or as Member'

14 Sri R K Jain relied upon a decision of a Division Bench of this Court in the case of Bhagwan Das Baranwal v The State of Uttar Pradesh, reported in 1956 All LJ 409 This case need not detain us at all for twin reasons firstly that the Advocate General had conceded that the notice which was subject matter of the said decision was 'an unsatisfactory one', and the other even more important reason that the said decision rendered on May 7, 1956, was well before the amendment brought in U P Act 41 of 1976, under which, inter alia sub clauses (vii) and (viii) of clause (b) of sub-section (2) of S 48 were brought on the statute book Naturally the case was decided considering the clause (vi) which refers to the President having been 'guilty of misconduct in the discharge of his duty" and makes no reference to clause (viii) which also encompasses 'any other misconduct whether before or after the commencement of the Uttar Pradesh Urban Local Self Government Laws (Amendment) Act 1976, whether as President or as Member ' We are not dealing with this submission in greater detail because in view of our findings on the last two of the arguments advanced on behalf of the petitioner (listed hereinabove) this does not survive for consideration

15 We shall now take up arguments Nos 4 and 3 advanced on behalf of the petitioner in that order

16 Submission No 4 above is to the effect that none of the charges levelled against the petitioner fall within the four corners of S 48 and, as such there can be no question of any action for removal being taken against the petitioner under the provisions of S 48 and consequently also no question of the petitioner being suspended in exercise of the power under sub section (3) of S 48 The other argument is that even if the charges levelled against the petitioner are taken as they are no case for taking action against the petitioner under S 48(2) of the Act is made out as the charges relate to the duty of the Board and not to that of the President

17 For the purpose of dealing with these two arguments we shall take up the first two of the charges contained in the show cause notice issued against the petitioner and examine the petitioner s argument in the light of the provisions of the U P Municipalities Act and the fact comprises the charge levelled against the petitioner The fact comprised in charge No 1 may be summarised as follows —

On the agenda of the meeting of the Board dated 17th April, 1989, was an item relating to purchase of electrical goods of the value of 2 lacs 16 thousand rupees With regard to this, it appears that an estimate had been submitted earlier and the items duly brought on the agenda After discussion the resolution relating to this item being resolution No 221 was duly passed After this it is alleged, a resolution purporting to be resolution for the purchase of one thousand P C C Poles was inserted The value of the electrical goods represented above is of the order of about 28 lacs of rupees and it appears that neither any estimate was obtained nor was the item property brought on the agenda so as to ensure due and proper notice thereof and deliberation thereon But the thing does not stop there Assuming that resolution was indeed passed on the 17th of April, 1989 for the purchase of electrical goods of the value of about 28 lacs the further allegation is that no reasonable efforts were made to obtain the aforesaid goods in a manner most beneficial to the City Board, Ghaziabad Instead a tender notice was inserted in a little known local daily called Gau Ganga', of the 25th of May 1989 inviting tenders by 3 00 p m on the 26th May 1989 The obvious purport of the allegation is that the tender notice was inserted in an insignificant daily newspaper only in order to make a show of tenders having been invited and insufficient time was given for receipt of the tender so that no genuine parties may get an adequate opportunity of filling in their tender and thus favourable conditions were created so that a party which was intended to be favoured could actually be granted the favour for supplying the electrical goods in question to the City Board

18 The charge further recites that the terms and conditions of the tender were not observed and unauthorised and improper party was given the tender in a manner devoid of sincerity and integrity We may mention here that while dealing with the submissions made on behalf of the petitioner on the first two charges Sri A P Singh learned Chief Standing Counsel appearing on behalf of the respondents briefly took us through the relevant provisions of the U P Municipalities Act having a bearing on this aspect of the matter Referring to the relevant provisions he prefaced his submission in this behalf by the statement that the President s is a statutory post under S 9 of the Act and the President is an Officer of the Board as defined in the section containing the definition Sri A P Singh drew the pointed attention of the Court to the definition of the term 'Board under S 2(1) of the Act which defines the Board as a Municipal Board and includes within the definition, in any case where a power is expressed as being conferred or a duty as being imposed on a Board a committee appointed by a Board and any member officer or servant of a Board authorized or required by or, under this Act to exercise the power or perform the duty Mr Singh then referred to the provisions of S 80 which outlines the functions of the Board that must be discharged by the President, underlining the provisions of S 50(b) relating to general supervision of all officers and works of the Board and S 50(e) which includes "all other duties, powers and functions of a Board" with the exception of three items mentioned therein S 51 of the Act provides for the additional duties of the President and includes within its purview the duty and the power to watch over the financial affairs of the Board and to superintend the executive administration of the Board and to bring to the notice of the Board any defect therein, as also the duty and the power to convene and preside at all meetings of the Board and to otherwise control in accordance with any regulations made in this behalf the transaction of business at all meetings of the Board In substance and effect, Mr Singh argued, the President oversees everything Mr Singh pointed out that whereas in the case of the purchase of electrical goods worth only 2 lacs 16 thousand rupees an estimate had been obtained the item had been placed on the agenda to ensure proper notice thereof to the members and to ensure due deliberation thereof by the meeting and was duly passed after proper notice and mature consideration in the case of electrical goods worth about Rs 26 lacs to rupees 28 lacs neither had any estimate been obtained nor had the item been duly placed on the agenda nor, for that matter had in fact a resolution been passed An insertion seems to have been made in the minute book to the effect that a resolution was passed for the purchase of electrical goods one thousand PCC poles the value thereof comes to nearly 28 lacs rupees Mr Singh argued that even if in fact a resolution had been duly passed on the 17th of April 1989 it is difficult to justify no attempt being made to secure the best interest of the City Board by inviting tenders with sufficient notice giving adequate time so as to ensure that the most benefical results for the City Board were obtained in the purchase of the electrical goods in question Instead, a notice of tender was inserted in a little known daily whereas usually Ghaziabad notices are expected to be printed in Delhi newspapers Again, very little time was given before closing of tenders which, according to Mr Singh, appears to have been done in order to favour a particular party with obvious motives Mr Singh pointed out that even after all this the tender was awarded to an unauthorized person unde [illegible] conditions of the tender in so far as at the time of the tender no security deposit was obtained from the party concerned who did not really qualify at that point of time as it did not meet the requirement of being registered as a Class A contractor at the time when the tender was awarded to him Similarly, referring to the second charge which relates to the allotment of several shops by the President on substantial premium, Mr Singh inter alia complained that the President, whose duty and power it was to make the allotment, did so without having a proper criteria fixed for its allotment and without issuing any advertisement in the daily newspapers in respect thereof and further after bank drafts worth lacs of rupees were received by the President in connection with the payment of premium for the allotment of the aforesaid shops, the President kept the same with him for a period of about four months without banking the same with the obvious result of causing serious loss to the City Board Ghaziabad (We may mention that Mr R K Jain learned counsel for the petitioner, in the course of his submission on the aforesaid charge, had admitted that the allotment was done by the petitioner, but had argued that it was so to speak a continuation of what was done by the Ghaziabad Development Authority and could not be termed as an independent misdemeanour Mr Jain had argued that the allotment done by the President on a first come first serve basis to 86 out of the 108 applicants had been made bona fide)

19 Mr Singh submitted that it was not permissible on the part of the petitioner to seek to get out of his responsibility by making subtle distinction as to what were the President's duties and what are the duties and functions of the Board itself and arguing as Mr Jain did, that it may be a case of superseding the Board but certainly not taking action for removal against the petitioner Mr Singh argued that in view of the functions, duties and powers of the President as indicated above various acts complained of fell very much within the purview of S 48(2)(b)(vi) but, in any case, S 48(2)(b)(viii) is wide enough to encompass the acts complained of against the President Mr Singh urged that, in fact the petitioner who is the President of the [illegible] of the members of the Board was actively involved in making sure that a contract for the purchase of good worth a very huge amount was improperly and unfairly given to an unauthorised party to the serious detriment of the Board and with the obvious motion of making unfair an illegal gain to himself In any case, Mr Singh urged that the President had been sadly remiss in his duty of general supervision over all officials and works of the Board and particularly in his duty to watch over the financial affairs of the Board and to superintend the executive administration of the Board and particularly to bring to the notice of the Board any defect in the same Mr Singh further argued that it is for the President to convene and preside at all meetings of the Board and otherwise control the transaction of business at such meetings in a competent and bona fide manner Any matter involving the purchase of goods worth 28 lacs of rupees Mr Singh argued, one would expect a proper estimate to be obtained, the matter to be placed on the agenda of a meeting and a resolution passed after due deliberation by members having notice of the same This does not appear to have been the case here, instead a resolution appears to have been interpolated in the minute book recording the sanction of the Board of the item relating to the purchase of electrical goods of the order of about rupees 28 lacks The President cannot disown the responsibility for this whether he is found to be personally involved in this or whether it has been done otherwise when it was his bound en duty to execise proper control over the transaction of the business and the recording of the minute of the meeting of the Board Furthermore, the matter of purchase of goods worth about rupees 28 lacks cannot be termed as a routine administrative matter and assuming that sanction was indeed accorded by a resolution on the 17th of April, 1989, one cannot but wonder ever the inaction of the powers that be for nearly a month and a half before issuing a notice notifying tender in an insignificant newspaper giving what is per as inadequate time for submitting tenders to the City Board of Ghaziabad As indicated earlier, it is the duty of the President to watch over the financial affairs of the Board and to superintend the executive administration of the Board and to bring to the notice of the Board any defect therein and one could legitimately expect an alert and sincere President would notice that the manner in which the transaction of awarding the contract for the purchase of electrical goods worth 28 lacs of rupees had been brought about was grossly improper, irregular and against the interest of the Board and was in fact, to the detriment of the Board It would in such an event also be his duty to report the matter to the Board and ensure remedial action being forthwith These are certainly matters within the purview of S 48 and relate both to the discharge of the duties of the President as also to his conduct as President

20 Mr Singh referred to the relevant words of S 48 and submitted tht all that the section required was that the State Government should have "reason to believe" that any of the things or factors enumerated in Section 48 existed According to Mr Singh, there was adequate material for the State Government to have reason to believe that the ground set out in sub-section (2) of S 48 existed

21 Mr Singh further submitted that the Government had then also directed the A D M to make a sort of preliminary enquiry and report to the Government with findings as a result thereof A copy of this report is annexed as annexure No 2 to the writ petition Mr Singh pointed out different portions from the said preliminary report to show that as a result of the preliminary enquiry the A D M had expressed the view that resolution 221 related to an item of the agenda of the meeting of the City Board, Ghaziabad, dated 17th of April, 1989, with regard to the purchase of goods of the estimated value of rupees 2 lacks 16 thousand, which was approved by the said meeting To this appears to have been added an item with regard to the purchase of one thousand poles for which neither any estimate was called nor was the same placed on the agenda, but a resolution for inviting the tender was made a part of the minute book The preliminary report enumerates various other irregularities with regard to the manner in which the notice of tender was given in an insignificant newspaper in which it was given and the grossly inadequate time within which the tender was fixed, the terms and conditions of the tender which were not observed and on top of everything, an unauthorised person was illegally given the tender of contract in breach and violation of the terms and conditions of the tender and subsequently by a resolution No 740, the tender to M/s Allied Engineers for Rs 27,12,700/ was granted ex post facts approval Mr Singh urged that the Government had, on the one hand, received several complaints against the petitioner as mentioned in the show cause notice and had also made appropriate enquiries to ascertain at least prima facie the relevant facts and when it had bona fide reason to believe that the President was guilty of the charges levelled against him which fell squarely within the purview of S 48, issued him show cause notice giving him an appropriate opportunity of showing cause and, later on, by a letter dated 4th of May, 1991, in exercise of the powers under S 48(3) of the Act placed the petitioner under suspension As against this, Mr Singh pointed out the petitioner who had been served with a show cause notice dated 20th of March 1991 had by its reply dated 5th of April 1991 sought various copies of the minutes, sought permission to collate the copies of the minutes and the resolution of the Board and had sought to rely on the same by looking into the records of the Board and had sought permission for so doing and had further sought an additional time of one month after all the material requested for by the President had been made available to him for sending his further reply to the show cause notice, but throughout it was not the case of the President either that the charges levelled against him were beyond the purview of the provisions of S 48 of the Act or that even if the charges levelled against him were taken as proved, no case was made out for his removal as President. Thus was an afterthought on the part of the petitioner after an order was passed by the State Government placing the petitioner under suspension on the 4th of May, 1991

22 We find much substance in the arguments advanced by Mr V P Singh and in the light of the above discussion we find ourselves unable to accept the argument on behalf of the petitioner that none of the charges contained in the show cause notice fall within the four corners of S 48 of the U P Municipalities Act or that even if the charges levelled against the petitioner are taken, as they are, as true, no case is made out for taking action against the petitioner under S 48(2A) of the said Act In fact, it is obvious that the petitioner will have some explaining to do while dealing with the charges against him as indicated by the bit of sampling exercise undertaken hereinabove for examining two of the charges contained in the show cause notice issued to the petitioner As a detailed argument in this behalf had been submitted on behalf of the petitioner, the Court finds no alternative but to deal with them appropriately and satisfactorily and in the process has expressed its views on some of the matters argued before the Court Suffice it to say, as we expect, the State Government in the course and conduct of proceedings under S 48 of the Act to proceed unmfluenced by our observations herein made by us while dealing with the arguments advanced by the petitioner so far as the merits of the charges are concerned as at present the proceedings are only at the show cause notice stage

23 A feeble attempt was made on behalf of the petitioner to allege mala fides in the action against the petitioner by submitting that one Mr Tyagi who was a party to a motion expressing no confidence against the petitioner as President of the City Board, Ghaziabad, failed to go through on the 9th of July, 1990, the show cause notice dated 20th of March, 1991, was got issued by the aforesaid Mr Tyagi who persuaded the Chief Minister to direct the Commissioner, Meerut Division to get an enquiry held against petitioner and the Commissioner, Meerut Division, appointed Sri Tejpal Singh, A D M (City) Ghaziabad, to hold the enquiry, which the aforesaid A D M (City) Ghaziabad, held and completed and submitted his report to the State Government finding five of the six charges against the petitioner to have been prima facie established.

24 Mr Jain submitted that the powers of this Court under Art 226 of the Constitution are sufficiently wide to strike down the action which is being pursued against the petitioner No material has been placed before us adequate to justify a conclusion that the action of the State Government is [illegible] the motion expressing want of confidence against the petitioner stated to have fallen on the 9th of July 1990, the show cause notice was issued to the petitioner on the 20th of March, 1991 this surely does not justify the allegation of the petitioner in the petition that the Government has acted in hot haste" If anything, the facts seem to indicate a certain amount of circumspection with which the State Government has proceeded Even after the receipt of various complaints against the petitioner, the Government has made appropriate enquiries and it was only after consideration of the relevant facts and circumstances that the Government has issued the show cause notice and more than a month and half thereafter issued the order placing the petitioner under suspension A show cause notice has been duly issued and served upon the petitioner The petitioner has purported to reply to the same and has sought further material in order to enable him to send a further reply to the same for which purpose he has sought further time and after consideration of the relevant facts and circumstances of the case, the Government has issued an order of suspension under S 48(3) of the Act which entitles the Government to place under suspension a President who is called upon to show cause in respect of any grounds mentioned in clause (a) or sub clauses (vi) (vii) and (viii) of clause (b) of sub-section (2) of the said Section The action of the State Government can neither said to be mala fide nor beyond the purview of S 48 of the U P Municipalities Act Having said this we wish to make it clear that it is not for this Court at this stage to go into the merits or demerits of the charges levelled against the petitioner for that is a function which will have to be performed by the State Government in accordance with the provisions of the U P Municipalities Act

25 As regards the "wide powers' of this Court under Art 226 of the Constitution of India, referred to in the argument, one must always bear in mind the distinction between the existence of wide powers and the propriety and desirability of using them and these powers have to be used taking into consideration, the nature of the right infringed or threatened to be infringed, the scope and object of the legislation or of the order or decision complained of the need to balance the right and interest of the individual as against those of the society and the circumstances under which and the person by whom the jurisdiction is invoked as also the nature of the relief sought' In order that certiorari may lie, the respondents must be shown to have acted without jurisdiction or in excess of jurisdiction conferred upon them by law Whereas this Court does not hesitate to interfere to prevent manifest injustice, it will not interfere on the merits with the determination of issues which function is entrusted to the State Government which has been invested with statutory power under the provisions of the law concerned The respondents cannot be said to have acted either without jurisdiction or in excess of jurisdiction or in contravention of the principles of natural justice or any constitutional provision

26 In the circumstances the petition fails and the same is dismissed

Petition dismissed

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